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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11**

DUKE UNIVERSITY

Employer,

and

**SOUTHERN REGION WORKERS
UNITED,**

Petitioner.

Case No. 10-RC-313298

PETITIONER’S POST-HEARING BRIEF

Petitioner, Southern Region Workers United (“Petitioner,” or the “Union”) seeks to represent a unit of graduate students providing research and/or instructional services at Duke University (“Duke,” the “University,” or the “Employer”).¹ Duke University objects on the basis that the petitioned-for students are not employees under the National Labor Relations Act (the “Act”) and are different from those at issue in *Columbia University*, 364 NLRB 1080 (2016).²

In 2017, this Region held that the petitioned-for graduate students were statutory employees because they performed services under the direction of the University for

¹ Petitioner’s amended petition seeks to represent “All Ph.D. students in Duke University departments housed at its campuses in Durham and Beaufort, North Carolina, who are working toward Ph.D. degrees offered by the Duke Graduate School and who are employed by Duke University to provide instructional services in undergraduate or graduate-level courses or labs (including, but not limited to, Teaching Assistants, Graduate Assistants, Instructors, and Graders) or to provide research services (including but not limited to Research Assistants and Graduate Assistants); excluding all students at Duke Kunshan University and Duke-NUS Medical School, all students not working towards Ph.D. degrees offered by the Duke Graduate School and all other employees, guards and supervisors as defined in the Act.”

² The terms “Ph.D. students” and “graduate students” are used interchangeably throughout this brief, as are “petitioned-for employees” and “graduate student employees.”

compensation. *See Duke University*, 10-RC-187957 (2017). There have been no material changes in the working conditions of the petitioned-for employees since 2017 that distinguish this case from *Columbia* in any meaningful way. Accordingly, the Union respectfully requests that the Region order an election in the petitioned-for unit as soon as possible.

PROCEDURAL HISTORY

On March 3, 2023, the Union filed a petition to represent graduate student employees who provide research and/or instructional services—teaching assistants (“TAs”), graders, instructors of record, writing consultants, research assistants (“RAs”), and graduate assistants (“GAs”),³—at Duke, as well as graduate fellows not separately employed to provide those services. Except for the addition of fellows, the petitioned-for unit is identical to that in which this Region directed an election in 2017. *See* Decision and Direction of Election, *Duke University*, 10-RC-187597 (Jan. 18, 2017) (hereinafter referred to as “DDE”).

On March 17, 2023, Duke filed its Statement of Position contending that the petitioned-for graduate student employees are not “employees” under the Act, and that the Board wrongly decided *Columbia University*, 364 NLRB 1080 (2016) (hereinafter “*Columbia*”), which held that students performing instructional or research work for universities are statutory employees under the Act. (Duke Pos. Stmt., p. 3, ¶ 1.) Duke also asserted that the graduate fellows are not employees under *Columbia*, citing *Massachusetts Institute of Technology* (“MIT”), 01-RC-304042 (March 13, 2023). (Duke Pos. Stmt., p. 3, ¶ 4.)

That same day, the Union amended its petition to exclude the graduate fellows not directly employed to perform research or instructional services for Duke, which mooted Duke’s

³ The petitioned-for unit includes students who provide instructional services but who do not have the title of “teaching assistant,” including Instructors of Record, Graders, and Writing Consultants. There may be other titles of which the Union is unaware.

objection based on *MIT*. The Union further amended the language of the petitioned-for bargaining unit to exactly match the bargaining unit found appropriate by Regional Director Claude Harrell, Jr. in 2017. *See* DDE, p. 29.

On March 23, 2023, the Union filed a Motion to Preclude a Pre-Election Hearing on the employee status of the petitioned-for employees, arguing that (1) *Columbia* was well-settled law; (2) this Region had already found the petitioned-for employees to be statutory employees in 2017; and (3) that there had been no material changes in the circumstances of Duke’s graduate students since the Region’s 2017 DDE.

A pre-election hearing was held from March 27-29, 2023, in Durham, North Carolina. The Region permitted a hearing on the issue of whether changes to Duke’s doctoral program since 2017 distinguished the petitioned-for employees from those in *Columbia*. On March 29, 2023, the parties entered into a Joint Stipulation of Evidentiary Record to constitute the “complete fact and documentary record, in lieu of a pre-election hearing” for the Region’s consideration. *See* Joint Stipulation of Evidentiary Record, (“Jt. Stip.” ¶ 1.).⁴

The Joint Stipulation of Evidentiary Record contains a joint stipulation of facts and several attachments. First, the Joint Stipulation provides that the parties “stipulate to all of the facts as written” in the 2017 DDE—at pages 1-24 of the DDE—with the exception of specially enumerated updated facts.⁵ (Jt. Stip. ¶¶ 4, 5(a-ee).) On one particular issue—the reduction of stipends for graduate students—the parties stipulated as to the evidence each party would present. (Jt. Stip. ¶ 5(cc-ee).) Second, the parties stipulated into the record recent admission and

⁴ The Joint Stipulation of Evidentiary Record was entered into evidence as Joint Exhibit A.

⁵ The 2017 DDE is included as Attachment A to the Joint Stipulation. It will be cited as “DDE.”

appointment letters for petitioned-for employees, contained in Attachment B.⁶ (Jt. Stip. ¶ 5(bb).) Third, the parties stipulated into the record a statement about changes to the educational aspects of Duke’s doctoral program that have occurred since 2016 and accompanying exhibits, contained in Attachment C.⁷ (Jt. Stip. ¶ 6.) Fourth, the parties stipulated into the record the declarations of petitioned-for employees, contained in Attachment D.⁸ (Jt. Stip. ¶ 7.) Last, the parties stipulated into the record Duke policies, organization charts, and program descriptions, which are labeled as Joint Exhibits 1 through 17 and contained in Attachment E.⁹ (Jt. Stip. ¶ 8.) At hearing, the parties clarified that Attachments C and D are intended to have equal evidentiary weight.

STATEMENT OF FACTS

I. In 2017, This Region Concluded That the Petitioned-For Employees at Duke Are Statutory Employees Under the Act.

On November 10, 2016, petitioner Service Employees International Union, of which the Southern Region Workers United is an affiliate, filed a petition to represent the same unit of petitioned-for graduate student employees at Duke. The University objected to the petition on the same basis, contending that its graduate students are different from those in *Columbia* and not employees under the Act. Duke also argued that the Board had wrongly decided *Columbia*.

⁶ Letters contained in Attachment B will be referred to by bates stamp numbers (e.g., Att. B, DUKE0002250).

⁷ Attachment C contains a statement of facts submitted by Duke and a number of attached documents. The statement of facts in Attachment C shall be cited as “Att. C, Stmt. ¶ _.” Numbered attachments contained in Attachment C shall be referred to by number, i.e., Attachment 5 within Attachment C will be cited as “Att. C (5), p. _.”

⁸ Declarations in Attachment D shall be referred to by the name of the declarant (i.e., Dolan Decl. ¶ _).

⁹ Joint exhibits contained in Attachment E shall be referred to as standalone exhibits (i.e., “Jt. Ex. 8.”).

An eight-day hearing was held before the Region in Durham from November 28 through December 7, 2016. At hearing, the parties, which were represented by the same legal counsel, presented significant testimony and documentary evidence. On January 18, 2017, Regional Director Claude T. Harrell, Jr. issued a decision finding that the petitioned-for graduate students were employees under *Columbia*, and ordering a mail ballot election in the unit.

In rendering his decision, Regional Director Harrell held that the petitioned-for graduate students performed instructional and research services for the University, under the University's control, for compensation. DDE, p. 27. He found no material differences between the petitioned-for students at Duke and those at issue in *Columbia*.

Regional Director Harrell acknowledged that "Duke invests substantial resources in [e]nsuring that Ph.D. students learn to teach well and research effectively and students undoubtedly benefit from teaching and researching." DDE, p. 25. He further noted that "[i]t is also clear that the requirements to serve as a TA, Grader, or RA [are] an integral part of their training and many times the work that they do is in furtherance of and even essential to their dissertations." DDE, p. 25. He held, however, that these facts alone did not strip the petitioned-for employees of their protections under the Act.

First, Regional Director Harrell found that the petitioned-for employees were statutory employees under *Columbia* because they perform important work from which Duke benefits—they instruct and assist in classes that faculty must teach; and they perform research to fulfill the terms of external research grants. DDE, p. 25.

Second, Regional Director Harrell determined that the petitioned-for students were directed in their work because the "faculty member to whom the student is assigned tells the student what tasks to perform and how to perform them." DDE, p. 27. Similarly, although

“laboratory RAs may operate with a large degree of independence . . . their research must still be within the terms of the grant and they must account for the cost of their research.” DDE, p. 27. Regional Director Harrell also noted that poor performance by a petitioned-for employees could result in discipline or other consequences. DDE, p. 27.

Last, Regional Director Harrell found that the petitioned-for employees are compensated for their services, “paid through the university payroll system[,]” and “[t]he amounts are reported on a W-2 as regular income.” DDE, p. 26. He noted that students can receive supplemental income when they take on extra assistantships not required of them. And he noted that, although Duke contended that students’ stipends are not reduced when they do not perform services, evidence showed that they were in fact reduced on some occasions. DDE, p. 26.

In this case, the parties stipulated to all of the facts as written in the 2017 DDE. (Jt. Stip. ¶ 4.) The parties also stipulated to specific facts that have changed since the 2016 hearing. (Jt. Stip. ¶¶ 5(a-ee).) And they stipulated into the record evidence concerning current petitioned-for employees. (Att. D, Decls. of Augeri, Coughlin, Dolan, Nguyen, Reale-Hatem, Riddler, Thomas, Tintera, and Wadle.) The stipulated record demonstrates little change in the facts upon which the Regional Director relied in issuing the 2017 DDE.

II. The Petitioned-For Employees Perform Instructional and Research Work in Exchange for Compensation.

Duke is a private research university with four campuses in Durham, North Carolina, and a marine laboratory in Beaufort, North Carolina. DDE, p. 2. Duke employs around 1,600 tenured and tenure-track faculty, and 2,220 non-tenure-track faculty. (Jt. Stip. ¶ 5(a).) Approximately 6,500 undergraduate students and 10,600 graduate and professional students are currently enrolled at Duke. (Jt. Stip. ¶ 5(a).) Of the graduate students, about 2,500 are Ph.D.

students. DDE, p. 2. In 2022, Duke received gross income of approximately \$950 million from tuition and fees, and \$1.4 from research grants and contracts. DDE, p. 2; (Jt. Stip. ¶ 5(b).)

The Graduate School is one of the ten schools within Duke. DDE, p. 2. All Ph.D. degrees are awarded by the Graduate School. DDE, p. 2. There are over 50 Ph.D. programs at Duke, which are grouped into five divisions: humanities, biological and biomedical sciences, physical sciences, engineering, and social sciences. (Jt. Stip. ¶ 5(e).) The Graduate School sets the overall degree requirements for Ph.D. students. DDE, p. 3. However, each department has separate specific degree requirements. *Id.* Ph.D. applicants are first evaluated by departments and then submitted to the Graduate School for final approval and admission. DDE, p. 3.

A. Funding For Graduate Students Includes Non-Compensatory and Compensatory Pay.

The funding for graduate students at Duke has remained largely unchanged since the 2017 DDE. Graduate students have guaranteed funding for their first five years at Duke. DDE, p. 4. Students in their sixth year may receive funding through their department, by obtaining a teaching or research assistantship, or from external sources. DDE, p. 4. If they are unable to do so, they may also apply for tuition scholarships provided by Duke. (Att. C (18).)

Funding covers the cost of tuition and fees and provides a stipend—an amount set by the Graduate School based on the cost of living in Durham. DDE, p. 4. In academic year 2022-2023, graduate students received a stipend of \$34,660. (Jt. Stip. ¶ 5(i).)

Graduate students' funding is comprised of "a variety of payments" according to Duke's "Graduate Student Payments and Reimbursements Policy," which has been in place since 2015. (Jt. Ex. 9, p. 1.) Pursuant to the policy, graduate student funding is divided between non-compensatory pay and compensatory pay "based upon whether or not the payment is for services rendered or a component of an award package." (Jt. Ex. 9, p. 1.)

Non-compensatory pay includes payments “in the form of a fellowship which is awarded to aid the student in the pursuit of their education and for which no service to the University is required.” (Jt. Ex. 9, p. 1.) This payment is issued to students through the University’s “non-compensatory payment system,” and reported on an IRS Form 1099. (Jt. Ex. 9, p. 2.)

Compensatory pay includes “compensation for services provided to Duke.” (Jt. Ex. 9, p. 2.) Services include instructional work—as a teaching assistant, grader, instructor of record, or writing consultant—and research work—as a research assistant or graduate assistant. (Jt. Ex. 9, p. 1.) University policy provides that “reporting and withholding is applicable” for compensatory pay, which is issued through the payroll system and reported on W-2 Forms. (Jt. Ex. 9, p. 2.) Duke requires the “comple[tion] [of] a Form W-2 for each employee to whom they pay a salary, wage, or other compensation as part of the employment relationship.” (Jt. Ex. 10.)

Graduate student employees earn \$6,100 in compensatory pay per course for serving as a teaching assistant, and \$3,050 per course for serving as a grader. (Jt. Stip. ¶ 5(j).) They receive around \$3,000 in compensatory pay per semester for serving as research assistants in the humanities, social sciences, and some natural science departments. DDE, p. 6; (Jt. Stip. ¶ 5(j).) Research assistants funded through research grants earn about \$2,805 per month in compensatory pay. (Jt. Stip. ¶ 5(j).) All compensatory pay amounts are reported on W-2 Forms and paid through the University’s payroll system. (Jt. Ex. 9, p. 2.)

Duke began providing all students with 12-month stipends during the 2022-23 academic year. (Jt. Stip. ¶ 5(i).) It previously provided some graduate students with nine-month stipends and others with 12-month stipends. DDE, p. 5. Providing 12-month stipends for all students brought Duke in line with its peers, including Harvard, Brown, and Northwestern.¹⁰ (Att. C (1),

¹⁰ The graduate student employees are unionized at these peer institutions.

DUKE 0001156.) As part of the 12-month stipend, Duke offers a number of summer funding opportunities for graduate students. (Att. C (23), DUKE 0000001.)

“Some of the summer funding sources carry a service requirement (e.g., teaching assistantships, internships), just like some of the academic-year funding sources that make up part of the standard Ph.D. funding package.” (Att. C (23), DUKE 0000001-2.) For example, summer teaching assistantships may be available to students “based on their teaching experience[.]” (Att. C (23), DUKE 0000003.) And “departmental assistantships” may involve “service assistantship in the department, either in the scan lab or helping faculty with research, bibliographies, etc.” (Att. C (23), DUKE 0000004.)

Graduate students receive the same benefits as they did in 2016, though the amount of those benefits has increased since then. Graduate students continue to receive six years of health coverage through the Duke Student Medical Insurance Plan. DDE, p. 4. They may be eligible for \$10,000 in additional coverage for medical expenses not covered by the plan (up from \$5,000 in 2017), a child care subsidy of \$7,000 per year (up from \$5,000 in 2017), and nine weeks of paid parental leave (up from seven weeks in 2017). DDE, p. 4; (Jt. Stip. ¶ 5(g).)

B. Admission and Appointment Letters Make Clear That Compensatory Funding Is Conditioned on Providing Instructional or Research Services.

Graduate students are informed of the service requirements of their funding packages through Graduate School admission letters, department award letters, and annual reappointment letters. DDE, p. 19. The Graduate School provides acceptance letter templates to notify students of their acceptance into a Ph.D. program. DDE, p. 19; (Jt. Ex. 17, Ch. 3.) Department letters list the service requirements for Ph.D. candidates, and must “state whether the departmental service requirements are for academic or compensatory purposes.” (Jt. Ex. 17, Ch. 3 at p. 34) (emphasis added). The 2017 DDE discussed examples of admission and reappointment letters, many of

which refer to teaching assistant and research assistant services as “work,” and students’ compensation as “income.” DDE, pp. 19-22. The substance of these letters is the same as those described by the 2017 DDE.

For example, the acceptance letter from the Psychology and Neuroscience Department provides that students’ funding for the first academic year consists of a fellowship. (Att. B, DUKE 0002271). However, “[f]unding for the second through the fifth years of Ph.D. study will be provided through a combination of research/teaching assistantships and/or fellowships.” (Id.) The letter describes the service activities as a “valuable part of . . . professional development as well as a source of income.” (Att. B, DUKE 0002271) (emphasis added).

The letter sets forth the requirement that students must teach four teaching assistantships during their second and third years in the program, and explains that many students also work as research assistants to “receive[] income.” (Att. B, DUKE 0002271.) It conditions funding on “fulfillment of department service requirements,” good academic standing, and progress towards the degree. (Att. B, DUKE 0002271.)

After receiving an initial acceptance letter, students receive annual appointment and reappointment letters that describe their service requirements for that year. Like those described in the 2017 DDE, the appointment and reappointment letters in the record make clear that the petitioned-for employees are expected to provide instructional and research services in order to receive compensatory funding from the University.

For example, a reappointment letter from the Literature Department offered a stipend consisting of a “fellowship component in the amount of \$13,045, for which no work service is required, and either a teaching or graduate assistantship in the amount of \$12,200, which represents a reasonable value for the services you will be providing.” (Att. B, DUKE 0002250)

(emphasis added). To accept the assistantship, the letter requires the student to “provide the University with evidence of employability as required by federal government regulations.” (Att. B, DUKE 0002250.) This same language was used in a reappointment letter sent to Hunter Augeri, a fourth-year Ph.D. candidate in the English Department. (Augeri Decl. ¶¶ 1, 4, Att. A.)

Matthew Thomas, a second-year graduate student in the English Department, received an appointment letter for an instructional position as a “writing consultant.”¹¹ (Thomas Decl., Att. A at p. 1.) The letter explains Thomas’ shifts and duties, and provides that “[i]n recognition of [his] service, [he] is to be paid \$6,100 in . . . monthly installments[.]” (Thomas Decl., Att. A at p. 1.) To accept the offer, Thomas was required to “understand the terms and conditions of employment contained in [the] letter.” (Thomas Decl., Att. A at p. 2) (emphasis added).

An appointment letter from the Department of Sociology describes a student’s funding as consisting of “a work stipend and fellowship.” (Att. B, DUKE 0002468.) It further states that “[t]he work stipend requires a commitment from you of 19.9 hours a week, during the academic year. While assignments may change, we currently anticipate you working as a Teaching Assistant.” (Att. B, DUKE 0002468) (emphasis added).

A letter from the Department of Romance Studies provides that the graduate student recipient would “receive a compensatory stipend of \$1,525 for [their] instructorship . . . and a non-compensatory stipend of \$1,280 . . . for which no work service is required[.]” during the Fall 2022 semester. (Att. B, DUKE 0002389) (emphasis in original). The letter identifies the recipient’s “immediate supervisor” for the instructorship, and informs them that they are scheduled to serve as a teaching assistant in the Spring 2023 semester. (Att. B, DUKE 0002389.)

¹¹ As explained below, graduate students in the English Department are required to serve as a writing consultant during their second year. Writing consultants are instructional appointments akin to teaching assistantships and receive the same rate of compensatory pay.

The letter also requires that the recipient attend a week-long general teaching orientation, and states that “a detailed job description will be sent at a later date regarding your responsibilities as an instructor in the French Language Program.” (Att. B, DUKE 0002390) (emphasis added). It explains that students “may not work for more than 19.9 hours per week in non-dissertation-related research appointments, teaching assistantships or other instructional positions, or other employment.” (Att. B, DUKE 0002390) (emphasis added). It also provides “[a]s a condition of accepting the instructorship and TA offered in this letter you will be required to provide the University with evidence of work authorization[.]” (Att. B, DUKE 0002390.)

Aeran Coughlin, a second-year graduate student in the Biology Department, received an appointment letter offering them a position as a teaching assistant with a “total gross salary” of \$25,245 payable in monthly installments. (Coughlin Decl., ¶ 1, Att. A) (emphasis added). Coughlin’s letter specifies that they are “expected to work, on average, up to 19.9 hours per week and to be available to the course professor(s) from the first day to the last day of [their] assignment.” (Coughlin Decl., Att. A) (emphasis added). The letter further describes Coughlin’s specific job duties and warns that failure to properly fulfill these duties could lead to discipline and/or termination. (Coughlin Decl. ¶¶ 5-6, Att. A.) The letter also states that “[t]he department reserves the right to make last-minute changes in assignment in order to best meet its educational mission.” (Coughlin Decl., Att. A.)

C. Petitioned-For Employees May Earn Supplemental Income or Have Their Stipend Reduced Based on the Services They Choose to Provide.

Like those in 2017, the current petitioned-for employees may take on additional teaching or research assistantships to supplement their standard stipends. DDE, p. 7; (Att. C (24), DUKE0001745.) There is no longer a limit on how much graduate students can earn in supplemental income, however, they may not spend more than “19.9 hours per week on ‘non-

dissertation-related research appointments, teaching assistantships, or other instructional positions, or other employment (both on and off campus).” DDE, p. 7; (Att. C (24), DUKE0001747) (emphasis added).

For example, Augeri worked as an instructor of record for an undergraduate seminar during the Fall of 2022. (Augeri Decl. ¶ 5.) As instructor of record, Augeri was the sole teacher for the seminar. (Augeri Decl. ¶ 5.) In addition to his appointment as an instructor of record, Augeri served as a teaching assistant for two sections of an online writing class. (Augeri Decl. ¶ 6.) He was paid an additional \$1,525 per section. (Augeri Decl. ¶ 6.) Augeri was not appointed to do this extra assistantship work. (Augeri Decl. ¶ 6.) Instead, he sought out the teaching assistantships so that he could earn more income and pay his rent. (Augeri Decl. ¶ 6.)

In addition to being eligible for supplemental funding, graduate students may also receive reductions in the compensatory pay portion of their stipends if they are unavailable to complete the assistantship. DDE, pp. 23-24. As it did in 2017, Duke contends it has an unwritten policy of not reducing stipends for students under any circumstances. (Jt. Stip. ¶ 5(cc).) The evidence shows otherwise in practice and in written department policies.

For example, the Music Department’s graduate student handbook provides that “[f]ull financial aid will be awarded only to students who are in residence; those who after the completion of their coursework choose to live outside the Durham area will not receive the TA portion of their income stipend.” (Jt. Stip. ¶ 5(ee)) (emphasis added).

The Religious Studies Department also follows this approach. In a reappointment letter to a student, the Department states: “[y]our funding for the coming year will consist of a fellowship . . . with a stipend of \$30,610, which includes no earnings from teaching (as you will be out of residence). You have been given a service waiver for fall semester only. . . we

normally expect that you will be available to serve as a teaching assistant (or preceptor) for one course per semester in years two through four.” (Att. B, DUKE 0002339.)

Matthew Tintera, a third-year graduate student in the Religious Studies Department, received a stipend reduction of \$3,050 in compensatory pay for the Spring 2023 semester because he could not fulfill a teaching assistantship while living in Connecticut. (Tintera Decl. ¶ 3.) After informing his department that he would be living in Connecticut during the Spring 2023 semester, Tintera received an email stating that because he “won’t be able to TA while living there,” he “won’t be able to earn the \$3050 that [he] would have earned in compensatory pay for [S]pring[.]” (Tintera Decl., ¶ 3, Att. at p. 2.) The email further explained that Tintera was “obligated to do a job until year 5.” (Tintera Decl., ¶ 3, Att. at p. 2.)

Like Tintera, Augeri informed his department that he will be living out-of-state during the Fall 2023 semester. (Jt. Stip. ¶ 5(cc).) The English Department explained to Augeri that if there were no assistantship opportunities that he could perform from his new place of residence, he would not receive the compensatory portion of his stipend. (Jt. Stip. ¶ 5(cc).)

Although graduate students may experience a reduction in stipend if they choose to be unavailable to perform an assistantship, those who try but are unable to secure an assistantship may be provided with “backstop funding.” DDE, p. 17; (Att. C (23), DUKE 0000002.) For example, if a research assistant is working in a lab for a faculty that suddenly loses funding, that graduate student may receive “backstop” funding until they can find a position in another lab. DDE, p. 17. Similarly, students who are unsuccessful in obtaining summer funding may be eligible for “backstop” funding if they can demonstrate that they have applied for other forms of support. (Att. C (23), DUKE 0000004.)

III. The Petitioned-For Employees Perform Instructional and Research Services at the Direction of the University.

The petitioned-for employees' job duties, and the manner in which they are directed, has remained unchanged since the 2017 DDE. Typically, graduate students are assigned to perform these services for particular faculty—either those who are teaching courses, or performing research. DDE, p. 11. Those faculty assign job duties to graduate student employees and oversee their work. DDE, p. 11. They also may take disciplinary action if they feel that graduate student employees are not properly fulfilling their job duties. DDE, pp. 9, 18,

Graduate student employees, unlike those who are not performing research or instructional services, are subject to a limited vacation policy. (Jt. Ex. 8.) The policy provides that graduate students holding assistantship appointments may take a total of 12 days off per year (4 in the fall semester, 5 in the spring semester, and 3 in the summer semester). (Jt. Ex. 8, p. 2.) “Students who need or wish to take more time off than the minimum listed . . . should discuss those arrangements with their RA, TA, or GA supervisor.” (Jt. Ex. 8, p. 1.)

A. The Petitioned-For Employees Provide Instructional Services That Benefit the University.

Many departments require graduate students to perform instructional service as part of their degree requirements. DDE, p. 13. Instructional roles at Duke include teaching assistants, and some variation thereof such as graders, instructors of record, and writing consultants. Duke's Human Resources Department maintains job descriptions for employees. (Jt. Ex. 11.) The teaching assistant job classification, for example, “permit[s] compensation to graduate and professional students performing teaching activities[.]” (Jt. Ex. 11, DUKE 0002060.)

i. Teaching Assistants and Graders

Teaching assistants may not work more than 19.9 hours per week and are eligible for worker's compensation benefits. (Jt. Ex. 11, DUKE 0002060.) They "perform a variety of roles related to teaching" including grading essays and exams, developing courses, leading class discussions or sections, providing course or lab instruction, and other incidental duties. (Jt. Ex. 11, DUKE 0002060.) Multiple teaching assistants may be assigned to help a faculty with larger courses. *See e.g.*, (Augeri Decl. ¶ 8.) Graders "are limited to grading tests and assignments for a faculty member." DDE, p. 11.

The work of teaching assistants is directed by the instructors of the course that they are assigned to assist with. Coughlin, a second-year graduate student in the Biology Department, is a teaching assistant for an undergraduate course titled "Ecology for a Changing Planet." (Coughlin Decl. ¶¶ 1-2.) Coughlin is directed by the faculty teaching the course to perform various job duties, including facilitating class discussions, holding office hours, and grading assignments. (Coughlin Decl. ¶ 3.) Coughlin's appointment letter describes their job duties as including "holding weekly discussion or lab sessions and office hours, grading, communicating with the instructor on a regular basis, . . . answering student e-mails, and providing general support as requested by the professor(s) to whom [they are] assigned." (Coughlin Decl. ¶¶ 5-6.)

Coughlin's appointment letter provides that they are "expected to work, on average, up to 19.9 hours per week, and to be available to the course professors from the first day to the last day of [their] assignment." (Coughlin Decl., Att. A.) It further provides that if Coughlin's duties exceed the 19.9-hour limit, Coughlin should inform the Director of Graduate Students "so that more resources can be provided for the course." (Coughlin Decl., Att. A.)

Importantly, Coughlin’s letter acknowledges that their “duties are important to the success of the department.” (Coughlin Decl., Att. A) (emphasis added). To that end, the letter explicitly states that Coughlin could be subject to discipline up to termination for failing to perform their job duties. It states:

“In the case of failure to fulfill your obligations competently or to the satisfaction of the professor or department, the department reserves the right to take disciplinary action or enact penalties. These may include verbal or written warnings, a reduction in future teaching or research opportunities, or for repeated or serious infractions, job termination or suspension from the program.”

(Coughlin Decl., Att. A at p. 2) (emphasis added).

Teaching assistants may perform work for courses that are not relevant to their area of research. DDE, p. 12. Augeri, a fourth-year graduate student in the English Department, has served as a teaching assistant for multiple classes. (Augeri Decl. ¶¶ 1-3.) He is currently a teaching assistant for an undergraduate film course that is not relevant to his dissertation. (Augeri Decl. ¶ 7.) He is paid \$12,200 for his teaching assistantship, which “represents a reasonable value for the services [he is] providing.” (Augeri Decl. ¶ 4) (emphasis added).

As a teaching assistant, Augeri attends classes, leads class sections, gives students feedback on their work, and grades assignments. (Augeri Decl. ¶ 3.) On one occasion Augeri’s supervisor complained that his grading was untimely. (Augeri Decl. ¶ 9.)

Augeri has also performed clerical duties as a teaching assistant. (Augeri Decl. ¶ 8.) For example, as part of his current teaching assistantship, Augeri downloads videos from YouTube and converts them into mp.4 files for his supervising faculty member. (Augeri Decl. ¶ 8.) Similarly, one of his co-teaching assistants is tasked with going to the library to pull films that the faculty member wants to show in class. (Augeri Decl. ¶ 8.)

Griffin Riddler, a fourth-year graduate student in the Political Science Department, has served as a teaching assistant in several classes. (Riddler Decl. ¶¶ 4, 6.) Last semester, Riddler was a teaching assistant for a game theory class. (Riddler. ¶¶ 4-5.) Game theory is not relevant to his dissertation or area of research. (Riddler. ¶¶ 4-5.)

As a teaching assistant, Riddler was tasked with developing problem sets and answer keys for the class, grading problem sets, and holding office hours for students taking the class. (Riddler Decl. ¶ 4.) He also compiled and collated grades in a grading sheet. (Riddler Decl. ¶ 4.) He was directed to do these tasks by the class instructor. (Riddler Decl. ¶ 4.)

While working as a teaching assistant, Riddler made some mistakes in the problem sets that he had prepared for the class. (Riddler Decl. ¶ 5.) Riddler's supervisor disciplined him for making these mistakes by removing his teaching duties that involved directly meeting with students. (Riddler Decl. ¶¶ 4-5.) As a result, Riddler was not permitted to hold office hours during the second half of the semester. (Riddler Decl. ¶¶ 4-5.)

Currently, Riddler works as a teaching assistant for a statistics course. (Riddler Decl. ¶ 6.) As a teaching assistant for this class, Riddler attends class, grades problem sets, and runs a lab once a week during which he instructs students on statistical methods using software. (Riddler Decl. ¶ 6.)

Matthew Reale-Hatem, a fourth-year graduate student in the University Program of Environmental Policy, has worked as a teaching assistant for both undergraduate and graduate-level courses. (Reale-Hatem Decl. ¶¶ 1, 5.) Reale-Hatem's primary job duties as a teaching assistant have included attending class, holding office hours, grading problem sets and exams, and performing clerical work. (Reale-Hatem Decl. ¶ 5.) Their work was directed by the faculty teaching the classes. (Reale-Hatem Decl. ¶ 5.)

ii. Instructors of Record

In addition to working as teaching assistants, graduate student employees may also serve as instructors of record for courses. Unlike teaching assistants, instructors of record serve as the sole instructor for a course and “do everything a faculty member would generally do including conducting lectures, designing lesson plans, creating and grading assignments and issuing final grades.” DDE, p. 12.

For example, Augeri served as instructor of record for a course titled “Cults and Conspiracies,” which was offered by the English Department during the Fall of 2022. (Augeri Decl. ¶ 5.) Augeri was the sole instructor of the course. (Augeri Decl. ¶ 5.) In addition to designing the course, Augeri gave lectures to students during class, held office hours, and graded all assignments. (Augeri Decl. ¶ 5.) Despite being paid for this work, Augeri had to seek out supplemental teaching assistantships to make ends meet. (Augeri Decl. ¶ 6.)

Reale-Hatem currently serves as an instructor of record for an undergraduate class in the Nicholas School of the Environment. (Reale-Hatem Decl. ¶ 2.) The professor who typically teaches the class is on sabbatical. (Reale-Hatem Decl. ¶ 3.) Reale-Hatem is the sole instructor of the class, which meets twice a week. (Reale-Hatem Decl. ¶ 2.) They give lectures in class, administer and grade assignments and exams, hold office hours, and meet with students to answer questions and provide feedback on their work. (Reale-Hatem Decl. ¶ 3.)

iii. Writing Consultants

Writing consultants “teach in the Thompson Writing Program” in the English Department. (Att. C (7), DUKE 0001338.; Thomas Decl. ¶ 3.) Augeri worked as a writing consultant in the Fall of 2021. (Augeri Decl. ¶ 2.) As a writing consultant, he tutored and

instructed students on various writing projects under the supervision of the Thompson Writing Program Directors. (Augeri Decl. ¶ 2.)

Thomas, a third-year graduate student in the English Department, served as a writing consultant last semester. (Thomas Decl. ¶¶ 1-2.) Thomas received an offer letter for his position as a writing consultant. (Thomas Decl. ¶ 3, Att. A.) The letter stated that writing consultants must work a total of 13 hours per week—12 hours for tutoring duties and one hour for meetings and administrative duties. (Thomas Decl., Att. A.) It stated that Duke “has the right to own, patent, and exploit Intellectual Property (Copyright) discovered or invented, or created in the course of your assigned duties.” (Thomas Decl., Att. A.) The letter also conditioned acceptance on Thomas’s understanding of “the terms and conditions of [his] employment[.]” (Thomas Decl., Att. A at p. 2.)

Duke sometimes requires graduate student employees providing instructional work to attend mandatory training sessions. DDE, p. 13; (Thomas Decl. ¶ 3.) All of the aforementioned petitioned-for employees are paid for their instructional services through the payroll system, and the amounts they receive are reported on a W-2 Form. (Coughlin Decl. ¶ 7; Augeri Decl. ¶ 10; Riddler Decl. ¶ 7; Reale-Hatem Decl. ¶ 6; Thomas Decl. ¶ 6.)

B. The Petitioned-for Employees Assist Faculty with Their Research in the Humanities and Perform Research to Fulfill Scientific Research Grants.

Generally, “Student Research Assistants (RAs) are assigned to a specific research project or project(s) for a defined length of time, generally not less than one semester.” (Jt. Ex. 11, DUKE 0001821.) They “provide leadership and expertise in conducting complex research activities, including planning, organizing, conducting, and communicating research studies within the overall scope of a research project at Duke University.” (Jt. Ex. 11, DUKE 0001821.)

i. Research Assistants Working in Labs

Graduate students working as research assistants in the hard sciences typically work in labs led by faculty who also serve as principal investigators. DDE, p. 15. Principal investigators typically receive funding for their labs through external research grants. DDE, p. 15. These grants may come from governmental organizations such as the National Sciences Foundation, nonprofit groups, or corporations. DDE, p. 15. The grants are paid directly to Duke. DDE, p. 15. Duke retains about half of the grant for overhead, and distributes the remaining amount to the lab performing research pursuant to the grant. DDE, p. 15.

Research assistants in labs conduct research to fulfill the terms of their principal investigator's grant. DDE, p. 16. Therefore, it is not uncommon for research assistants to tailor their dissertation topic to fit within the work being done by the lab. DDE, p. 16. Research assistants in labs work alongside other employees, including lab managers, post-doctoral fellows, and staff scientists. DDE, p. 16. "Because of the continuous nature of the research work, a student may need to arrange for someone else in the lab to cover [their] duties if [they] are going to be absent." DDE, p. 16. Labs may also collaborate with other labs pursuant to an agreement. DDE, p. 16. In those cases, research assistants may be directed to work in another lab and conduct research not relevant to their dissertation research. DDE, p. 16.

Principal investigators are usually required to report on their progress and expenditures related to the research grant. DDE, p. 16. The results of any research performed in a lab, even if relevant to the research assistant's dissertation, are the intellectual property of Duke. DDE, p. 16. Most research labs are staffed throughout the entire year, with research assistants working 40-60 hours per week. DDE, p. 16; (Jt. Stip. ¶ 5(v).)

Research assistants perform a variety of job duties depending on the terms of the grant through which they are funded. For example, Thomas Nguyen, a fourth-year graduate student in the Neurobiology Department, works as a research assistant in a lab run by a principal investigator. (Nguyen Decl. ¶ 1.) Nguyen works alongside other staff in the lab including a post-doctoral employee, a lab technician, and two other graduate assistants. (Nguyen Decl. ¶ 2.)

The lab in which Nguyen works is funded primarily by two R01 grants from the National Institutes of Health (“NIH”). (Nguyen Decl. ¶ 5.) The NIH grants pay for lab expenses including personnel, equipment, and overhead. (Nguyen Decl. ¶ 5.) The research conducted in the lab primarily relates to understanding “how certain neuromodulator chemicals function, how they impact signaling in neural circuits, and how their distribution changes in aging and diseases, like Alzheimer’s.” (Nguyen Decl. ¶ 2.)

Nguyen’s dissertation concerns “where neurochemical receptors are expressed in the brain and how they impact visual processing in brain states like attention.” (Nguyen Decl. ¶ 1.) Although Nguyen’s dissertation research fits within the overall mission of the lab, not all of the research he conducts in the lab is relevant to or will be used in his dissertation. (Nguyen Decl. ¶ 6.) Rather, some of the research he conducts is work to be performed for the NIH grants funding the lab. (Nguyen Decl. ¶ 6.) Regardless, all of the research that Nguyen conducts in the lab is the intellectual property of Duke. (Nguyen Decl. ¶ 6.)

Nguyen’s job duties include “conducting neurological tissue experiments and analysis using stored samples, as well as behavioral and neurophysiological experiments involving non-human primates.” (Nguyen Decl. ¶ 4.) He also performs “lab maintenance tasks including care and watering of non-human primates and monitoring of the lab’s freezer and tissue storage.” (Nguyen Decl. ¶ 7.) Nguyen performs much of this research work in collaboration with other

members of the lab. (Nguyen Decl. ¶ 4.) He also may perform some job duties for lab staff when they take time off from work, and vice versa. (Nguyen Decl. ¶ 7.)

Similar to Nguyen, Emma Dolan, a sixth-year graduate student in Duke's Department of Pharmacology and Cancer Biology, works as a research assistant in two labs. (Dolan Decl. ¶2.) As a research assistant, Dolan conducts research, some of which has not been used in her dissertation. (Dolan Decl. ¶ 3.) She also performs lab management tasks that would otherwise be performed by staff, such as maintaining liquid nitrogen tasks, ordering supplies for the lab, and handling samples. (Dolan Decl. ¶¶ 3-4.)

Austin Wadle, a fifth-year graduate student in the Department of Civil and Environmental Engineering, works as a research assistant in a lab. (Wadle Decl. ¶ 2.) Wadle primarily analyzes water and soil samples using instruments, and measures mercury levels in water and soil. (Wadle Decl. ¶¶ 1-2.) Wadle's research is supervised by a principal investigator who has a National Science Foundation grant. (Wadle Decl. ¶ 2.) As a research assistant, Wadle is tasked with conducting research to fulfill the terms of the grant. (Wadle Decl. ¶ 2.)

Most engineering students stay with the same primary investigator for the duration of their time at Duke. DDE, p. 18. However, a primary investigator can ask a research assistant to leave a lab if they are displeased with the assistant's performance. DDE, p. 18. In those cases, students may receive backstop funding while they find a new research assistant position with another lab. DDE, p.18.

Per Duke policy, all graduate students "working as RAs [are] paid a base salary via the faculty-staff payroll[.]" (Jt. Ex. 7, p. 2.) The compensation research assistants receive is reported on a W-2 Form. (Nguyen Decl. ¶ 3; Dolan Decl. ¶ 5; Waddle Decl. ¶ 5.) This pay normally comes from the research grant funding the research assistant's lab. (Nguyen Decl. ¶ 5).

The external “research grant supporting the student’s salary [is] also . . . required to pay tuition remission in accordance with Graduate School policy.” (Jt. Ex. 11, DUKE0001821.)

Tuition remission “is a component of the student’s total compensation package along with their salary and any applied fringe benefits.” (Jt. Ex. 7, p. 1) (emphasis added). Duke’s tuition remission policy provides that federal grants may be put towards a research assistant’s tuition where it “1) represents a reasonable compensation for necessary work on the project, 2) is provided in lieu of wages, and 3) is consistently applied throughout the institution.” (Jt. Ex. 7, p. 1) (emphasis added).

ii. Research Assistants and Graduate Assistants in the Humanities

Graduate students performing research assistantships in the humanities and natural sciences perform a variety of duties in order to receive compensatory funding. Research assistants in the humanities are typically assigned to a faculty member, who directs the research assistant and what tasks to perform. DDE, p. 11.

Research assistants “may summarize articles on a particular topic, check footnotes and references, prepare bibliographies and indices, and print hard copies of documents on microfilm.” DDE, p. 11. They may also “[l]ead, coordinate, and perform a variety of complex independent and team activities involved in the collection, analysis, documentation and interpretation of social, economic or health related information.” (Jt. Ex. 11, DUKE 0001821.) Research assistant assignments may be made by the department or by professors. DDE, p. 11.

Graduate students performing research in the humanities often perform both teaching and research assistant duties. These students may be called “graduate assistants.” (Jt. Ex. 11, DUKE 0001244.) “Graduate assistants’ teaching and incidental research assignments can vary from month to month, or week to week. Research assignments are generally short term, i.e., less than

one semester and funding sources are therefore not subject to the Graduate School Tuition Remission Policy for Ph.D. Student RAs.” (Jt. Ex. 11, DUKE 0001244.)

Graduate assistant job duties range from “grading essays and exams,” “course development,” leading class discussion sessions, and providing lab assistance and instruction, to the “collection, documentation, analysis, and interpretation of social, economic or health related information,” and “evaluation and interpretation of collected data[.]” (Jt. Ex. 11, DUKE 0001244.) Like research assistants and teaching assistants, graduate assistants are paid compensatory wages and are eligible for worker’s compensation. (Jt. Ex. 11, DUKE 0001244.)

For example, Riddler works as a graduate assistant. (Riddler Decl. ¶ 2.) In that position, Riddler has served as a teaching assistant in classes. (Riddler Decl. ¶¶ 2-4.) He has also performed and currently performs research assistant work for a professor in the Political Science Department. (Riddler Decl. ¶¶ 2-4.) As a research assistant, Riddler conducts research projects, works with various data sets, and compiles literature reviews. (Riddler Decl. ¶ 2.)

IV. The Material Circumstances of the Petitioned-For Employees Have Not Changed Since the 2017 DDE Was Issued.

The stipulated record contains a statement and documents submitted by the University regarding the “Reimagining Doctoral Education” (“RIDE”) Committee. *See* (Att. C.) The RIDE committee was created in 2017 to “conduct a university-wide appraisal of doctoral education at Duke.” (Att. C (1), DUKE 0001150.)

The RIDE Committee acknowledged the role of graduate students in furthering the business of the University and recognized that “[d]octoral students play important roles in undergraduate education, whether as teaching assistants or as mentors within vertically integrated research teams.” (Att. C (1), DUKE 0001153.) Given this benefit provided by graduate students, the RIDE Committee reasoned that having strong doctoral programs would

help Duke “thrive as a generator of new knowledge, [and] a provider of excellent undergraduate and professional education.” (Att. C (1), DUKE 0001153.)

The RIDE Committee published its findings regarding doctoral education in a 2018 report. (Att. C (1).) Among those findings were that Duke was making “insufficient progress on developing diverse and inclusive learning communities,” had “uneven quality of advising and mentoring,” and a need for better coordination between individual programs and Duke’s leadership. (Att. C (1), DUKE 0001150.)

Most notably, the RIDE Committee found that many students struggled to meet basic costs of living. For example, a faculty focus group conducted by the Committee raised concerns about the rising cost of living in Durham, the disproportionate impact of this cost on first generation students, and the fact that there is a food pantry for students. (Att. C (1), DUKE 0001200.) In a survey taken of graduate students, one stated:

“I lose sleep every night worrying about how I am going to simply survive monetarily as I finish my dissertation. This financial situation has affected my mental health and overall health, impeding my work as a teacher and delaying the dissertation, because it's hard to focus on abstract questions and the fascinating research problems when you have insomnia worrying about the problem of paying your credit card and phone bill. Whereas I had entered academia in the hopes of working as a professor, now I am working on simply getting my degree and getting out.”

(Att. C (1), DUKE 0001218.)

In addition to publishing the Committee’s findings, the report also made a number of recommendations, some of which have been implemented since 2018. For example, starting in 2022, Duke began offering 12-month stipends for all graduate students in line with peer institutions. (Att. C (1), DUKE 0001156; Att. C Stmt. ¶ 1.)

Other changes were broadly directed at expanding educational and professional development offerings, such as: “[i]ncreased participation of Ph.D. Graduate Students in shared

program and school governance”; “[d]evelopment and promotion of peer and alumni mentoring”; “[p]rogress toward improving the quality of faculty advising and mentoring through the adoption of explicit mentorship statements”; “[c]uration and sponsorship of new internship opportunities in areas of interest that are complimentary to the Ph.D. program”; “improved access to interdisciplinary courses”; and “[n]ew communication channels between students and program or Graduate School administration to address student concerns.” (Att. C Stmt. ¶ 1.)

The RIDE Committee report also recommended increased opportunities for students interested in engaging with pedagogy through fellowships and apprenticeships, as well as free online classes “on complementary methods and soft skills.” (Att. C Stmt. ¶ 1.) The Committee also recommended increased summer funding opportunities for students, including “mentored internship experiences” and “competitive training grants for students wanting to pursue internships outside of the university.” (Att. C Stip. ¶¶ 2-3.) Duke has also taken steps to “amplify diversity, equity, and inclusion” in its doctoral education program. (Att. C Stip. ¶ 4.)

Although the specifics of these changes are unclear, none have any impact on the terms and conditions of employment for graduate students as described above. The amplification of diversity, offering of free online classes, or creation of alumni mentoring networks, for example, has not changed the fact that graduate student employees are directed to do instructional and research work by the University in exchange for compensatory pay.

In addition to the RIDE program, Duke made a number of purely cosmetic changes to its administrative documents. The current version of the Graduate Student Manual illustrates the surface-level nature of Duke’s attempt to evade employer status under the Act. For example, the 2017 DDE refers to a specific portion of the Manual that stated:

“Compensation for the living wage (i.e., salary) for Ph.D. student *research assistants* must be paid through the faculty/staff payroll system. This coupled

with tuition remission and fringe benefits must reflect appropriate compensation for work services performed on the research grant or institutional research project. Student compensation must be charged to each funding source in proportion to the level of effort expended.”

DDE, p. 6. That same provision in the current Manual now states:

“*Stipend support* for Ph.D. student *research training* must be processed through the *compensatory* system. This, coupled with tuition remission and fringe benefits, must reflect appropriate *support levels for research performed* on the research grant or institutional research project. *Student stipend support* must be charged to each funding source in proportion to the level of effort expended.”

(Jt. Ex. 17, Ch. 4, p. 8.) Simply changing the words “research assistant” to “research training;” “compensation” to “stipend support;” “staff payroll” to “compensatory system;” and “compensation for work services performed” to “support levels for research performed” does not change the fact that students are still paid compensation for research assistant work.

Indeed, Duke engaged in similar semantic gymnastics in 2017, objecting to the use of the term “work,” and insisting that assistantship activities be called “services.” DDE, p. 26 (“Duties are referred to as ‘work,’ although the Employer may prefer the term ‘service,’ those duties are mandatory.”) Regardless of what term is used, the record demonstrates that graduate student employees today are just like those at issue in 2017—they are required to perform duties such as grading, instructing, and research, at the direction of departments and faculty, for compensatory pay distributed through the University’s payroll system.

ARGUMENT

Graduate students are employees covered by the Act where they perform work, under the control of a university, in exchange for compensation. *Columbia*, 364 NLRB at 1080. This Region found that the petitioned-for graduate students at Duke satisfied this test in 2017; it should find that they do so now.

As was true in 2017, Duke relies on graduate students to provide services that are central to its success as a major research university, and it has the right to control and direct the work graduate students perform. As was true in 2017, Duke compensates graduate students for their work through its payroll system and reports that compensation on W-2 forms. As was true in 2017, graduate students must work to receive their full stipends, can increase their stipends by working more assignments, and can receive less than their full stipend if they are unavailable to provide required services.

Duke attempts to deflect from this overwhelming evidence by focusing on irrelevant information about free online classes, curated summer internships, alumni mentoring networks, and pedagogical and professional development offerings. The Board in *Columbia*, however, made clear that the educational benefits that graduate students may derive from assistantships do not strip them of their employee status. *Id.*

This is a straightforward case, directly controlled by recent Board precedent. Duke has already delayed proceedings by raising baseless allegations about purportedly material differences between how it treated graduate student employees in 2017 and how it does now. Duke has failed to proffer any evidence that meaningful differences exist. The Region should therefore find in the Petitioner's favor and direct an election forthwith.

I. Graduate Students Are Statutory Employees When They Perform Work Under the Control of the University for Compensation.

Section 2(3) of the Act provides that “[t]he term employee shall include *any* employee” with specific enumerated exceptions. 29 U.S.C. § 152(3) (emphasis added). “The Supreme Court has observed that the ‘breadth of Section 2(3)’s definition is striking: the Act squarely applies to any employee.” *Columbia*, 364 NLRB at 1083 (quoting *Sure-Tan, Inc. v. NLRB*, 567 U.S. 883, 891 (1984)). The Act itself does not define the term employee. However, it is well

settled that where a statute does not define the term “employee,” courts should infer that Congress intended to incorporate the common law meaning. *Columbia*, 364 NLRB at 1083 (citing *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995)).

The Board applied these core principles in *Columbia* to hold that graduate students are employees under Section 2(3) of the Act “where they perform work, at the direction of the university, for which they are compensated.” *Id.* at 1080. In doing so, the Board overturned *Brown University*, 342 NLRB 483, 487 (2004), which had held that graduate students were not statutory employees because of their “primarily educational” relationship with the university.¹² *Columbia*, 364 NLRB at 1080.

The *Columbia* Board “reject[ed] the *Brown* Board’s focus on whether student assistants have a ‘primarily educational’ employment relationship with their universities.” *Id.* at 1085. It reasoned: “[t]he fundamental error of the *Brown University* Board was to frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one—a standard neither derived from the statutory text of Section 2(3) nor from the fundamental policy of the Act.” *Id.* at 1084.

The *Columbia* Board explicitly held that “statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.” *Id.* at 1080. “In other words, a graduate student may be both a student *and* an employee; a university may be both the student’s educator *and* employer.” *Id.* at 1086.

¹² *Brown University*, 342 NLRB 483 (2004), overturned *New York University*, 332 NLRB 1205 (2000) (*NYU*), which had held that graduate student assistants were employees.

Applying the proper standard based on common law employment, the Board held that a bargaining unit of undergraduate and graduate students performing instructional and research services at Columbia were employees under the Act. *Id.* at 1080. The Board found that the “university directs and oversees student assistants’ teaching activities,” which included “grading papers and holding office hours, leading discussion or lab sessions, or assuming most or all of the teaching responsibilities for a given course.” *Id.* at 1093-94.

The Board noted that although teaching assistants may gain some educational benefit from their work, “the university possesses a significant interest in maintaining . . . control” of that work “as the students assistants’ work advances a key business operation of the university: the education of undergraduate students.” *Id.* at 1094. The Board further noted that “teaching assistants who do not adequately perform their duties to the university’s satisfaction are subject to corrective counseling or removal.” *Id.*

The Board also found that Columbia conditioned the receipt of funding on the students’ performance of teaching duties. In doing so, it rejected Columbia’s argument that equalized payment among student assistants and non-assistants demonstrated otherwise. *Id.* at 1094. The Board held that “although payments to Ph.D. student assistants may be standardized to match fellowship or other non-work-based aid, these payments are not merely financial aid.” *Id.* “Students are required to work as a condition of receiving this tuition assistance during semesters when they take on instructional duties, and such duties confer a financial benefit on Columbia to offset its costs of financial aid.” *Id.* The Board found persuasive that the payment given to assistants is “generally treated as part of university payroll and is subject to W-2 reporting and I-9 employment verifications.” *Id.*

Similarly, the Board held that the “research of Columbia’s student assistants, while advancing the assistants’ doctoral theses, also meets research goals associated with grants from which the university receives substantial income.” *Id.* at 1096. Because “research assistants . . . work under the direction of their departments to ensure that particular grant specifications are met” they are employees. *Id.* Indeed, “the university typically receives a benefit from their research assistants’ work, as it receives a share of the grant as revenue and it is relieved of any need to find other sources of funding for graduate students under a research grant[.]” *Id.*

Since the issuance of *Columbia*, the Board has administered numerous elections in bargaining units of graduate student employees providing research and instructional services.¹³ Indeed, both in private and public universities, “[c]ollective bargaining by graduate student employees is increasingly a fact of American university life.” *Id.* at 1088.

II. The Petitioned-For Employees, Like Those at Issue in 2017, And Those at Issue in *Columbia*, Perform Services at Duke’s Direction, For Compensation.

The working conditions of the petitioned-for employees at Duke closely mirror those of the graduate students at issue in *Columbia*. Like in *Columbia*, the petitioned-for employees perform instructional and research services as directed by the University. They perform instructional and research work essential to the University’s business as a research university; work that would otherwise be performed by other faculty or staff. They can be verbally disciplined, have their duties and opportunities reduced for poor performance, and even be terminated from their assistantships.

¹³ See e.g., *The New School*, 02-RC-143009; *Harvard*, 01-RC-186442; *American University*, 01-RC-193768; *Brandeis University*, 01-RC-196695; *MIT*, 01-RC-289879; *Fordham University*, 02-RC-291360; *Clark University*, 01-RC-290362; *Worcester Polytechnic Institute*, 01-RC-303677; *Yale University*, 01-RC-305762; *University of Chicago*, 13-RC-307974; *University of Southern California*, 31-RC-308858; *Johns Hopkins University*, 05-RC-309139.

Like in *Columbia*, the petitioned-for employees here receive compensatory pay through the University's payroll in exchange for performing research and instructional work. Their appointment letters make clear that compensatory funding is conditioned upon fulfilling research and teaching assistantships. They may earn supplemental income through taking on extra appointments, or get a reduction in pay when they are not available to accept an appointment.

Like in *Columbia*, the petitioned-for employees are subject to a variety of terms and conditions of work such as a 19.9-hour work limit and specific allowances for paid time off. They are eligible for worker's compensation benefits, required to provide employment verification, and receive W-2 forms for the wages they are paid.

Duke does not dispute these facts. Instead, it contends that the petitioned-for employees are somehow different from those in *Columbia* because they are offered various mentorship and professional development opportunities. Not so.

Both the Board and this Region have acknowledged that assistantship work may be a degree requirement or carry educational value. That aspect, however, does not detract from the reality that student assistants contribute valuable services to the University in exchange for compensation. Therefore, the petitioned-for graduate students at Duke are employees under the Act just like those at Columbia and just like those working for Duke in 2017.

A. Duke Controls the Work of Petitioned-For Instructional Workers.

Duke's educational workers provide services central to Duke's identity as a prestigious higher educational institution. Teaching assistants at Duke provide materially indistinguishable services from comparable workers at Columbia. Just as at Columbia, they "frequently take on a role akin to that of faculty" and "conduct lectures, grade exams, and lead discussions."

Columbia, 364 NLRB at 1095; *see* (Jt. Ex. 11, DUKE 0002060.)

Duke relies even more extensively on the labor of its graduate students than Columbia. For example, instructors of record work as the sole instructors for the courses they teach. They design syllabi, give lectures in class, hold office hours, and grade assignments. DDE, p. 12. In one instance, an instructor of record was assigned to teach a professor's class while that professor was on sabbatical. (Reale-Hatem Decl. ¶ 3.) Writing consultants are assigned to work shifts at Thompson Writing Program during which they provide students with tutoring in their writing projects. (Augeri Decl. ¶ 2; Thomas Decl. ¶ 3.)

Even when an actual faculty member is assigned to a course, student instructional workers often assume some of the most burdensome aspects of teaching, such as grading, corresponding with students, and holding office hours. (Coughlin Decl. ¶ 3; Augeri Decl. ¶ 3; Riddler Decl. ¶ 4.) If graduate students did not perform this work, Duke still would have to provide it, either by burdening its faculty with the responsibilities, or hiring additional workers to fill the role of the graduate students. "Indeed, the fact that teaching assistants are thrust wholesale into many of the core duties of teaching—planning and giving lectures, writing exams, etc. . . . suggests that the purpose extends beyond the mere desire to help inculcate teaching skills." *Columbia*, 364 NLRB at 1095.

Duke has an incentive to control the work of instructional workers because their work is central to the university's primary product. Duke undeniably exercises that control. Duke ultimately assigns every instructional worker their position, and can do so without regard to the worker's academic or personal interests. (Riddler. ¶¶ 4-5; Augeri Decl. ¶ 7.) Duke makes that clear in students' appointment letters. *See e.g.*, (Coughlin Decl., Att. A. ("[t]he department reserves the right to make last-minute changes in assignment in order to best meet its educational

mission.”)); *see also* (Att. B, DUKE 0002468 (“While assignments may change, we currently anticipate you working as a Teaching Assistant.”)).

Like the instructional workers in *Columbia*, Duke’s teaching assistants work “with the guidance of a faculty members” and instructors of record work “under the direction of an academic department.” *Columbia*, 364 NLRB at 1093. Duke professors direct their teaching assistants’ work. (Augeri Decl. ¶¶ 2, 9; Riddler Decl. ¶ 4; Reale-Hatem Decl. ¶ 5.)

Like those at Columbia, instructional workers at Duke “who do not adequately perform their duties” are “subject to corrective counseling.” *Columbia*, 364 NLRB at 1094. For example, while working as a teaching assistant, Augeri was told that he was not grading assignments quickly enough. (Augeri Decl. ¶ 9.) Riddler was prohibited from holding office hours after his supervisor discovered mistakes in problem sets he had prepared for the class. (Riddler Decl. ¶¶ 4-5.) Coughlin’s appointment letter warned them that “failure to fulfill [their] obligations competently or to the satisfaction of the professor or department” could result in “disciplinary action or enact penalties” up to termination. (Coughlin Decl., Att. A.)

Duke receives significant income from undergraduate tuition. Duke relies extensively on the labor of its graduate students in order to provide that education. Given that Duke’s financial well-being depends on graduate students teaching, Duke does not allow instructional workers to teach without direction or guidance. Duke thus retains and exercises the right to control and direct instructional workers.

B. Duke Controls the Work of Petitioned-For Research Assistants.

Duke’s lab-based research assistants provide nearly identical services to those provided at Columbia. They typically work in labs funded by external grants provided to the University. While some of the research conducted in these labs may “advance[e] the assistants’ doctoral

theses, [it] also meets research goals associated with grants from which the University receives substantial income.” *Id.* at 1096.

Duke received around \$1.4 billion from research grants and contracts in the 2022 fiscal year. (Jt. Stip. ¶ 5(b).) When a principal investigator receives a grant, Duke keeps about half of it for overhead. DDE, p. 15. The “research grant supporting the student’s salary [is] also . . . required to pay tuition remission in accordance with Graduate School policy.” (Jt. Ex. 11.)

Given the importance of research grants to Duke’s financial health, Duke controls almost every aspect of a research assistant’s work. As with the research assistants at Columbia, the petitioned-for research assistants “are not permitted to simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress[.]” *Columbia*, 364 NLRB at 1096-97.

Instead, research assistants work “under the direction of their departments to ensure that particular grant specifications are met[.]” *Id.* at 1096; *see* (Nguyen Decl. ¶ 6; Wadle Decl. ¶ 2.) Not all of the research performed by research assistants is relevant to their dissertations. (Dolan Decl. ¶ 3.; Nguyen Decl. ¶ 6.) Research assistants also contribute to the development of intellectual property, including patents, over which Duke retains ownership. (Nguyen Decl. ¶ 6.)

Duke controls the terms and conditions of research assistants’ employment just as they would any other employee. Duke’s research assistants can perform the same tasks as other researchers employed by their principal investigator who are not pursuing degrees. (Dolan Decl. ¶¶ 3-4 Nguyen Decl. ¶ 7.) Assistants are not permitted to take time off without Duke’s approval, and receive a limited number of paid vacation days. (Jt. Ex. 8.)

Similarly, research assistants in the humanities and natural sciences also perform work at the direction of the University. These research assistants are assigned to specific professors.

DDE, p. 11. The assigned professor controls the student's work, which often supports necessary components of the professor's research. DDE, p. 11. For example, research assistants may conduct literature reviews or compile bibliographies. DDE, p. 11; (Jt. Ex. 11, DUKE 0001244; Riddler Decl. ¶ 2.) If a research assistant completes all the assignments given by a professor, that professor can then assign the assistant to work for a different professor. DDE, p. 11.

C. Petitioned-For Instructional Workers and Research Assistants Are Paid for Their Work.

Duke, like Columbia, pays its graduate student workers a portion of their stipends as compensation for the services they provide the University. Duke's policies distinguish between non-compensatory pay and compensatory pay "based upon whether or not the payment is for services rendered or a component of an award package." (Jt. Ex. 9, p. 1.)

Petitioned-for employees generally earn \$6,100 in compensatory pay per course for serving as a teaching assistant, and \$3,050 for serving as a grader. (Jt. Stip. ¶ 5(j).) Research assistants in the humanities earn \$3,000 in compensatory pay per semester, while research assistants in labs earn \$2,805 per month. (Jt. Stip. ¶ 5(j).) All of these payments are made through Duke's payroll system and reported as income on W-2 forms. (Jt. Ex. 9, p. 2.)

Departments expressly condition compensatory pay on work performed. Department letters refer to compensatory pay as "a source of income" and conditions funding on "fulfillment of department service requirements." (Att. B, DUKE 0002271). They also distinguish between non-compensatory "fellowship[s]... for which no work service is required, and either a teaching or graduate assistantship in the amount of \$12,200, which represents a reasonable value for the services you will be providing." (Att. B, DUKE 0002250) (emphasis added.).

Duke permits assistants to increase their stipends through additional work assignments. DDE, p. 7; (Att. C (24), DUKE0001745). For example, Augeri was paid \$3,050 to work as a teaching assistant in addition to the \$6,100 he earned as an instructor of record. (Augeri Decl. ¶ 5.) Duke cannot maintain that students are not paid for their services while simultaneously paying students more money when they accept more work assignments. Wages are undeniably provided “in exchange for services” provided by graduate student assistants.

Duke also has the power to reduce or eliminate students’ stipends when they do not perform required work. When assistants “do not perform their assigned instructional duties, the record indicates that they will not be paid.” *Columbia*, 364 NLRB at 1094. Many departments make the threat of stipend reduction clear in their policies and reappointment letters. *See, e.g.*, (Jt. Stip. ¶ 5(ee) (“those who after the completion of their coursework choose to live outside the Durham area will not receive the TA portion of their income stipend.”)); (Att. B, DUKE 0002339 (“You have been given a service waiver for fall semester only. . . we normally expect that you will be available to serve as a teaching assistant.”)).

Departments can and do follow through on such threats. For example, Matthew Tintera did not receive the compensatory portion of his stipend because he chose to live out of state and could not fulfill his teaching assistantship. (Tintera Decl., ¶ 3, Att. At p. 2.) Tintera’s department informed him that because of his out-of-state residence, he “won’t be able to earn the \$3050 that [he] would have earned in compensatory pay for spring” and that he was “obligated to do a job until year 5.” (Tintera Decl., ¶ 3, Att. at p. 2.) Duke, therefore, can and does reduce students’ stipends when they do not complete required work assignments.

Because the petitioned-for graduate students perform instructional and research work, at the direction of the University, receive compensatory pay from Duke for that work, they are employees under the Act.

III. Region 1’s Decision in *MIT* Fully Supports the Union’s Position.

While Duke may try to rely on Region 1’s decision in *Massachusetts Institute of Technology* (“MIT”), 01-RC-304042 (March 13, 2023), the decision fully supports the Union’s position in this case. In *MIT*, the Region held that graduate fellows—who are not working as research or teaching assistants, not directed by faculty, and not paid wages—are not employees. *MIT*, slip op. at 10-11. In this case, the Union’s amended petition removed graduate fellows from the petitioned-for unit, making the unit here just like the one already certified at MIT.

In 2022, Region 1 administered a union election in and certified a bargaining unit of graduate students performing instructional and research work—exactly like the petitioned-for unit in this case. *Id.* slip op. at 1; *see also MIT*, 01-RC-289879 (2022). Later that year, the union sought to add to the bargaining unit graduate fellows who were not separately employed as research or teaching assistants. *MIT*, slip op. at 1. The Region held that these fellows were not employees under *Columbia*. *Id.*

In evaluating the employee-status of the graduate fellows, Region 1 held that the “common-law definition of employment requires that the students perform work, directed by the university, in exchange for compensation.” *Id.* at 10. It stated that the “*Columbia* Board held that graduate students are employees despite the fact that a graduate assistant’s work might advance his own educational interests as well as the University’s interests.” *Id.*

Region 1 concluded that fellows are not employees because they significantly differ from research assistants in the existing bargaining unit at MIT. It examined the duties, supervision,

and compensation for research assistants and teaching assistants in the existing bargaining unit at MIT, which are remarkably like those of the petitioned-for employees at Duke. *Id.* at 4-5.

Just like the teaching assistants at Duke, the teaching assistants at MIT assist faculty in teaching courses, under the direction of the faculty. *Id.* at 4. Just like at Duke, the research assistants at MIT work “under the direct supervision of a faculty member who controls their funding and makes certain that their research assistant’s work aligns with the objectives in the contract on which they are supported.” *Id.* at 10-11. Just like at Duke, some of the assigned research work can be used for the research assistants’ theses, but some assigned work is not related to their theses. *Id.* Research assistants and teaching assistants receive paid vacation time, must fill out I-9 forms, are paid through MIT’s payroll system, and receive W-2 forms, just like the petitioned-for graduate students at Duke. *Id.* at 5.

In contrast with the petitioned-for employees at Duke and the research and teaching assistants at MIT, the graduate fellows at MIT receive funding without any service requirement or supervisory direction by faculty. *Id.* at 10-11. Students on fellowship can conduct research entirely as they wish, without being tied to a particular faculty member. *Id.* at 6-7. Fellows at MIT are not paid from a research group’s grant funding, so they are not assigned non-research tasks. *Id.* at 7. There is no limitation on the number of hours they can work or what vacation they take. *Id.* Fellows do not have income tax withheld, do not receive W-2 forms, and are not required to complete I-9 forms. *Id.* at 7. Indeed, the fellows at MIT are just like graduate students on fellowship at Duke, who are not in the petitioned-for unit, and who only receive non-compensatory funds for their stipend.

Region 1 found that “graduate fellows are not employees because they do not perform work controlled by the Employer in exchange for compensation.” *Id.* at 2. Graduate fellows—

like those at issue in the *MIT* decision—are not included in the petitioned-for unit. Here, the petitioned-for graduate student employees perform work, directed by Duke, in exchange for compensation. *See* Section II, *supra*. Therefore, the *MIT* decision further confirms that the petitioned-for employees at Duke are employees under *Columbia*.

III. The Purported Distinctions Raised by Duke Are Irrelevant.

As discussed above, there is overwhelming evidence that the petitioned-for employees at Duke are no different from those in *Columbia*. This was also true in 2017 when this Region held that the petitioned-for graduate students at Duke were employees under the Act. Duke has not and cannot show that anything material has changed since 2017.

A. Graduate Assistants Are Employees Regardless of Whether There Is Any Educational Component to their Work.

Duke does not appear to dispute that teaching assistants grade assignments, hold office hours, and conduct discussion and lab sessions. It does not dispute that research assistants must conduct research to fulfill the terms of external research grants. It does not dispute that this work benefits the University, or that the University pays research and teaching assistants through its payroll system. Indeed, Duke does not appear to dispute any of the core facts upon which Regional Director Harrell relied in issuing the 2017 DDE.

Instead of addressing the standard under *Columbia*, Duke attempts to distract the Region by introducing irrelevant information about its new pedagogical and professional development offerings. From free online tutorials on teaching to alumni mentorship networks, none of these offerings have any bearing on whether the petitioned-for employees perform work under the control of the University in exchange for compensation.

The fact that Duke views research and teaching assistantships as contributing to a student's education is not new. In 2017, Regional Director Harrell acknowledged that Duke "considers learning how to teach and evaluate student work as an integral part of a students' education." DDE, p. 9. He described at length Duke's professional development opportunities and programs, such as the Certificate in College Teaching, the Preparing Future Faculty program, and the "Best Practices and Core Expectations" document. DDE, pp. 9-10.

Regional Director Harrell was also clear that the potential educational benefits derived from assistantships did not detract from the valuable services provided by the petitioned-for employees. Indeed, the Board in *Columbia* explicitly rejected the notion that an educational relationship or aspect of a student's work detracted from their employment status under the Act. *Columbia*, 364 NLRB at 1096 ("[T]he fact that teaching may be a degree requirement in many academic programs does not diminish the importance of having students assist in the business of universities by providing instructional services for which undergraduate students pay tuition.")

Duke's vague assertions about the RIDE program and subsequent "changes" to its doctoral educational program are utterly irrelevant under controlling Board law and merely serve to deflect from the undisputed evidence demonstrating that its graduate student assistants are employees under the Act.

B. The Fact That the Petitioned-For Employees Receive 12-Month Stipends Does Not Remove Them from the Protections of The Act.

The only actual change in the terms and conditions of Duke graduate students since 2017 is the University's transition to offering all students 12-month stipends. As of the 2017 DDE, only some students received 12-month stipends, while others received 9-month stipends. DDE, p. 5. Duke changed its policy starting in 2022 to help students better meet the rising costs of

living in Durham, and to be consistent with the “norm among leading research universities.”
(Att. C (1), DUKE 0001150.)

The offering of 12-month stipends to all students instead of just some students in no way affects the employee status of the petitioned-for students. The fact that certain students may now receive a stipend during the summer months does not alter the fact that students on assistantships perform work for Duke, at Duke’s direction, in exchange for compensatory pay. Indeed, Columbia provides 12-month stipends to its students. (Att. C (1), DUKE 0001185.) And in 2017, Duke provided 12-month stipends to many of the petitioned-for employees, all of whom this Region found to be statutory employees.

C. Duke’s Attempts to Disavow the Compensatory Nature of Its Payments to Graduate Students Are Without Merit.

Duke may argue that the petitioned-for graduate students are not employees because they receive the same stipend amount regardless of whether they are providing any instructional or research services. This argument rests on two premises: first, that students are paid the same amount regardless of whether they work; and second, that any such pay equalization would bar employee status. The first premise is false. The second was rejected by *Columbia*.

First, the evidence shows that students are not paid the same amount regardless of whether they work. A student, once assigned to a work position, cannot abandon that position on a whim without repercussion. Rather, the evidence demonstrates that there are consequences for a failure to complete required duties. Duke can and does pay students more when they work more. *See* Section II.C, *supra*. Duke can and does pay students less when they work less. *Id.* In fact, this Region rejected Duke’s attempt to make the exact same argument in 2017. DDE, p. 26. Therefore, Duke’s argument regarding pay equalization is factually wrong.

Second, even if Duke did completely equalize graduate students' stipends, that fact would be irrelevant. *Columbia* concluded that pay equalization across semesters did not negate an employment relationship. It held: "[s]tudents are required to work as a condition of receiving . . . tuition assistance during semesters when they take on instructional duties, and such duties confer a financial benefit on Columbia to offset its costs of financial aid, even if it chooses to distribute the benefit in such a way that equalizes financial aid for both assistants and non-assistant students." *Columbia*, 364 NLRB at 1094. Thus, to the extent Duke engages in stipend equalization, *Columbia* renders that fact irrelevant.

If graduate students did not perform grading or hold office hours, Duke would place that burden on faculty or have to hire someone else. If graduate students did not fill hundreds of research roles in research labs, Duke's faculty would be forced to hire other researchers to satisfy their grant obligations. Duke cannot negate the obvious employment relationship it has with its graduate student workers simply by equalizing their pay across semesters.

D. Duke's Attempts to Disavow the Work Students Perform as Training Are Without Merit.

Duke may also point to the fact that where certain administrative documents once called assistantships "work" or "service," those documents now call that work "training." The fact that Duke went through some of its administrative documents following the 2017 DDE and replaced certain words does not change the reality of graduate students' working conditions.

Duke may now refer to the work that students perform as "training" in its Graduate Student Manual, but that editing does not reflect any actual change in practice. *See* Section II, *supra*. Indeed, its pay policies still refer to the pay students receive as "compensation." (Jt. Ex. 9, p. 1 (referring to pay as "compensation for services provided to Duke" and "payment . . . for

services rendered.”)). And department letters still refer to assistantship duties as “work service,” (Att. B, DUKE 0002250), “employment,” (Att. B, DUKE 0002390), a “job,” (Att. B, DUKE 0002390), and a “source of income,” (Att. B, DUKE 0002271).

It is well-established that when evaluating an employee’s status under the Act, the Board requires specific evidence beyond “mere paper” or conclusory statements. *See, e.g., Point Park Univ. v. NLRB*, 457 F.3d 42, 48 (D.C. Cir. 2006) (analysis of managerial status must “look beyond self-serving descriptions of the role of faculty or the administration of a university.”); *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) (“Job descriptions or other documents . . . are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority.”) Duke cannot simply change the employment status of an entire category of workers simply by going through some of its administrative documents with a red pen.

V. Election Mechanics and Voter Eligibility.

As explained above, the evidence clearly demonstrates that the petitioned-for employees are statutory employees under *Columbia*. The Region should therefore direct an election in the petitioned-for unit as soon as possible.

A. An Election Should Be Conducted Before the End of the Spring Semester Via a Mixed Manual-Mail Ballot.

The Union requests that the election be conducted during the Spring academic semester, which ends on May 14, 2023. The Union filed its petition over one month ago on March 3, 2023. Duke has already delayed an election by raising baseless arguments that were rejected by the Board in *Columbia* and by this Region in 2017. There is no valid reason that an election should be conducted over two months after the Union filed its petition.

The parties agree that any election during the Spring semester should be conducted via a mixed manual-mail ballot. The manual portion of the election should be conducted for all eligible voters working at Duke's Durham campuses. The parties agree that polling should take place over the course of three days, from 9:00 am to 2:00 pm and 4:00 pm to 8:00 pm. The parties also agree that the following polling locations are appropriate for the manual election: (1) the Lilly Library, (2) the Bryan Center, (3) the Levine Science Research Center, (4) Fitzpatrick Center, and (5) Gross Hall. The mail portion of the election should apply to eligible voters working on Duke's Beaufort Campus or working remotely for Duke.¹⁴

Duke agrees that a mixed manual-mail ballot election is appropriate, but contends that an election cannot be held from April 19, 2023, through May 14, 2023, because of “reading period”—the period of time between the end of classes and final exams—exams, and commencement. Duke claims holding an election during this almost-four-week period would be somehow infeasible because of inadequate space, campus commencement events, and potential disruption to other students. Duke's position is meritless and should be rejected.

First, Duke is one of the largest private employers in the state with a sprawling campus that houses tens of thousands of students and employees. In fact, Duke's directory shows that it has over 200 buildings on campus.¹⁵ Duke surely has sufficient room in a handful of those buildings that can be used as polling locations. Duke does not explain what specific locations

¹⁴ Lilly Library is located at 1348 Campus Dr., Durham, NC 27708. Lilly library is the only polling location located on Duke's east campus. All other polling stations are located on Duke's west campus. Bryan Center is located at 120 Science Dr., Durham, NC 27710. The Levine Science Research Center is located at 308 Research Dr., Durham, NC 27710. The Fitzpatrick Center is located at 101 Science Dr., Durham, NC 27705. Gross Hall is located at 140 Science Dr., Durham, NC 27708.

¹⁵ Duke University Directory of Buildings and Landscapes, https://forms.hr.duke.edu/media/fmd/building_directory_2017.pdf.

would not be available or why. However, if one or more of the agreed-upon polling sites is not available for use, the Union would be happy to work with Duke to find alternative locations.

Second, Duke has not and cannot give any specific information on how a three-day election period would somehow disrupt reading period, which occurs after the end of classes. Noting about holding an election would interfere with students' ability to study for exams. Likewise, Duke cannot explain how an election would disrupt exams, given that the polling sites are not in any classrooms, and would not entail any boisterous activity.

Finally, the fact that Duke has scheduled social events around commencement should in no way take priority over the right of employees to vote in a timely union election. Duke's conclusory statements about potential minor inconveniences are insufficient to deprive the petitioned-for employees of their right to a timely union election.

B. A Summer Election is Wholly Appropriate and Should Offer a Mail Ballot Option for All Eligible Voters.

Should the election be held after the Spring semester, during the summer, the Union requests that eligible voters be given the opportunity to vote manually or by mail ballot. *See e.g.*, Duke University, 10-RC-276475 (2021) (directing mixed manual-mail ballot election for Duke University Press workers where voters had the option to vote by mail or in-person). In the event such an election is not possible, the Union would request a two-week mail ballot election.

Although the petitioned-for employees receive 12-month stipends, many students leave campus during the summer to pursue research, conduct field work, or work in internships. Therefore, if an election is directed in between the Spring 2023 and Fall 2023 semesters, the Region should allow all eligible voters the option of voting by mail or in-person, or in the alternative, all by mail.

Duke disputes this point and instead requests a mixed manual-mail ballot election. As was the case in 2017, Duke cannot provide any specific reason for why this method of election would be preferable given the reality that students often leave campus during the summer months. This Region conducted a successful mail-ballot election in the same petitioned-for unit at Duke in 2017. DDE, p. 32. There is no reason for why a mail ballot election would not be effective this summer.

Given the scattered nature of students' employment and academic pursuits during the summer, a mail ballot option would ensure the greatest enfranchisement among eligible voters. Indeed, the Board has administered mail ballot elections during the summer months in higher education elections for this precise reason. *See, e.g., Santa Clara University*, 32-RC-294533 (mail ballot election with vote count on June 21, 2022); *McDaniel College*, 05-RC-175386 (mail ballot election with vote count on June 6, 2016); *Antioch University Seattle*, 19-RC-128561 (mail ballot election with vote count on July 23, 2014).

If necessary, an election during the Fall 2023 semester should be conducted by mixed manual-mail ballot in the same manner as described for the Spring 2023 semester.

C. The Voter Eligibility Formula Should Include A “Look-back” Period.

The parties agree that the proper voter eligibility formula for a Spring semester election, or summer semester election, includes eligible voters currently in the unit as well as those who served in bargaining unit positions during the Fall 2022 and Spring 2022 semesters. The Union also requests that, if an election is delayed until the beginning of the Fall 2023 semester, the voter eligibility formula include voters in the unit at the time of the election, and voters who held unit positions during the Spring 2023, Fall 2022, and Spring 2022 semesters.

An eligibility formula with a look-back period appropriate where “there are employees in the unit who, despite not being on the payroll at the time of the election, have a past history of employment that would tend to signify a reasonable prospect of future employment.” *Columbia*, 364 NLRB. at 1100. Students do not always serve as non-lab research assistants or teaching assistants during consecutive semesters. DDE, p. 34. Students may hold teaching or research assistantship positions even after completing their service requirements. *Id.* For example, a student in their sixth year may do research or teaching assistantship work to generate income even if not required to by the department. *Id.* Therefore, a voter eligibility period that includes a “look back” is necessary to enfranchise voters with a continuing interest in the unit.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Region find that the petitioned-for graduate employees are covered by the Act and direct an election forthwith.

Respectfully submitted, this the 7th day of April 2023.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

DUKE UNIVERSITY,

and

**SOUTHERN REGION WORKERS UNITED-
SEIU.**

Case No. 10-RC-313298

DUKE UNIVERSITY'S POST-HEARING BRIEF

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PRELIMINARY STATEMENT

Duke University (“Duke” or “University”) submits this post-hearing brief in support of its position that the petition filed by the Southern Region Workers United- SEIU (“Union”) should be dismissed because Duke’s Ph.D. graduate students included in the Union’s petitioned-for bargaining unit (“Ph.D. Graduate Students”) are not employees under National Labor Relations Act (“NLRA” or “Act”) Section 2(3).

A similar petition was filed in 2016, resulting in a 2017 Decision and Direction of Election (“2017 DDE”) erroneously concluding that Ph.D. Graduate Students were employees under *Columbia University*.¹ The Union subsequently lost the election. Duke maintained then—and maintains now—that its Ph.D. Graduate Students are not employees under *Columbia* because all Duke requires is that Ph.D. Graduate Students make academic progress toward their Ph.D. degree. There is no employer-like “control” exercised nor is there an exchange of services for compensation.

In 2016, an eight day hearing was held; here, the Union stipulated to an almost 800 page record (“Stipulated Record” or “Joint Stipulation”). That record unequivocally demonstrates that the facts and circumstances of a Duke Ph.D. Graduate Student’s education have changed significantly since 2016, diminishing—in some cases erasing altogether—the facts relied upon for employee status in the 2017 DDE. Indeed, Duke Ph.D. Graduate Students are more akin to the graduate fellows deemed not to be employees in *Massachusetts Institute of Technology* (“MIT”) in that their year-round funding—and component educational activities such as teaching and research—are solely designed to further their academic objectives.

¹ *Duke University*, Case No. 10-RC-187957 (2016).

Beginning in 2017, Duke began an extensive review of its Ph.D. program called “Re-Imagining Doctoral Education (“RiDE”),” resulting in a number of significant changes. Chief among them was for the University to provide a twelve-month irreducible stipend set at a level to allow the students to focus on their studies. This stipend is not reduced if a student is unable to take on teaching or research responsibilities; rather, it is tied exclusively to making academic progress to achieving a Ph.D. degree. RiDE also resulted in Teaching and Research Assistantships being inextricably tied to the educational goals of the student, and students are not removed or disciplined if they cannot perform those roles satisfactorily. Rather, the University mentors—in a teacher-student relationship—those students to help them learn from the experience, and continue making academic progress. Attaining an appropriate level of pedagogy and research skills is part and parcel of such progress, and Duke provides extensive training opportunities to its Ph.D. Graduate Students in these key areas.

The Union in the Stipulated Record acknowledges the relevant material facts. Evidence from the Ph.D. Graduate Students it has presented favors Duke’s position. Thus, as set forth more extensively below, and especially considering the post-2016 changes, Duke’s Ph.D. Graduate Students are not statutory employees and the petition should be dismissed.²

² Duke fully preserves its view that *Columbia* was wrongly decided and that *Brown University* enunciates the proper legal standard. (Argument § II)

If an election is ordered, as expressed at the March 27-29, 2023 hearing (“Hearing”), Duke objects to several election mechanics proposed by the Union and suggests more viable alternatives. (Argument § III)

STATEMENT OF FACTS

I. The Duke University Graduate School

Duke University is a private research university located in Durham, North Carolina. Duke has approximately 6,500 undergraduate students and 10,600 graduate and professional students. (Joint Stip. at ¶ 5(a)) The University is comprised of 10 schools, each of which has a dean who reports to the Provost of the University, or in the case of the Nursing and Medical Schools, to the Chancellor for Health Affairs.³ (Joint Stip. Attachment A at 3; Joint Ex. 2) The Graduate School, one of the 10, operates under the leadership of Dean Suzanne Barbour, Dean of the Graduate School and Vice Provost for Graduate Education. (Joint Stip. at ¶ 5(d)) Dean Barbour is responsible for overseeing all Ph.D. programs homed in any of the other nine schools at Duke. (Joint Stip. at ¶ 5(d); Joint Stip. Attachment A at 3)

Over 50 Ph.D. programs are offered through the Duke Graduate School. (Joint Stip. at ¶ 5(e)) These programs are grouped into four different divisions: Humanities, Biological and Biomedical Sciences, Physical Sciences and Engineering, and Social Sciences. (*Id.*) Each program has a Director of Graduate Studies, who serves as both the official administrator of the rules and regulations of the Graduate School for that program, as well as the designated advocate for the needs of the program and its students. (Joint Stip. Attachment A at 3) Approximately 2,500 Ph.D. Graduate Students currently are enrolled in the Graduate School.⁴ (*Id.* at 2)

³Trinity School of Arts and Sciences, the Divinity School, the Fuqua School of Business, the Graduate School, the Law School, the Nicholas School of the Environment, the Pratt School of Engineering, the Sanford School of Public Policy, the School of Medicine, and the School of Nursing. (Joint Stip. Attachment A at 3, n.1; Joint Ex. 2)

⁴The Graduate School's Bulletin sets forth the formal requirements for earning a Ph.D. degree, which include taking courses as determined by the student's degree program, training in the Responsible Conduct of Research, passing preliminary and final examinations, and completing the dissertation. (Joint Ex. 3)

II. The Educational Relationship Between the Graduate School and Duke's Ph.D. Teaching and Research Assistants

The Duke Graduate School has a published credo that every Ph.D. Graduate Student receives during orientation, entitled “Best Practices and Core Expectations” (hereafter referred to simply as “Core Expectations”), which outlines the core components of a graduate student’s education, and defines the expectations and obligations of each constituency that participates in that education. (Joint Stip. Attachment A at 9; Joint Stip. Attachment C at Attachment 26) Two of the four core components of a graduate student’s education at Duke, as stated in the Core Expectations, are (i) training in teaching, and (ii) research. (*Id.*)

A. Duke’s “Reimagined” Ph.D. Program Prioritizes Training and Professional Development Opportunities for Doctoral Students

Since 2016, Duke has worked to strengthen its doctoral education program, commissioning a committee in 2017 on “Reimagining Doctoral Education (“RiDE”),” to recommend action items for addressing challenges and obstacles facing Ph.D. Graduate Students at Duke and in doctoral education more broadly. (Joint Stip. Attachment C ¶ 1, Attachment 1) The RiDE Committee’s final report, which was published in December 2018, made a number of recommendations intended to help the University reconceptualize its Ph.D. program and to improve the experience of Ph.D. Graduate Students. (*Id.*) Following the RiDE report, the University, the Graduate School, and the individual Ph.D. programs have made great strides in “reimagining” its doctoral education program, implementing a number of significant changes in its approach to Ph.D. education. (Joint Stip. Attachment C ¶ 1, Attachment 2)

First, the University has prioritized training and professional development for Ph.D. Graduate Students. (Joint Stip. Attachment C ¶ 2) Creating new funding opportunities and programming for a broad spectrum of training and professional development experiences—which include training and professional development in teaching and research as well as other

skills necessary for the holistic academic pursuits and interests of Ph.D. Graduate Students—to prepare students for careers both in academia and beyond.⁵ (*Id.* at ¶ 2, 3, Attachment 1) In Duke’s reimagined Ph.D. programs, training and professional development—especially in teaching and research skills—are paramount because the “[U]niversity-wide mission for doctoral education [] takes the formation of the scholar, understood in all its current manifestations, as seriously as the production of scholarship.” (*Id.* at ¶ 2, Attachment 1 at 5)

Second, RiDE has had broad reaching implications for each of the schools, with doctoral education and training being reconceptualized at the program-level. One of the recommendations from the RiDE Committee was that each Ph.D. program engage in a critical self-assessment, or a “deep dive,” of their doctoral program and the experience of their students. (Joint Stip. Attachment C ¶ 5) While the process is ongoing, a number of Ph.D. programs have completed their “deep dive” and have adopted a more deliberate and thoughtful approach to doctoral education. (*Id.*) For example, in the Office of Biomedical Graduate Education in the Medical School, courses for first year Ph.D. Graduate Students have been centralized and revamped in response to the recommendations from the RiDE Committee. (*Id.*) First year Biomedical Ph.D. Graduate Students in the Medical School now take their required courses together upon matriculation to help build a better community and to ensure students are complying with University and external grant education requirements. (*Id.*)

Additionally, the RiDE report encouraged the use of “Intellectual Development Plans,” or “IDPs,” as part of Ph.D. Graduate Students’ annual evaluations to ensure a shared understanding between students, their faculty advisor, and other faculty members within each program of the

⁵ The new professional development funding opportunities and programming are discussed in detail in Section III(A)(2) *infra*.

student's long-term academic goals and strategies for achieving these goals. (*Id.*) IDPs also serve as a reminder to advisors and other faculty members of the centrality of professional development in the student's doctoral education. (*Id.*) Since publication of the RiDE report, IDPs have become a more broadly accepted practice across Ph.D. programs. (*Id.*) For example, Ph.D. programs within the Nicholas School of the Environment have incorporated IDPs for doctoral students. (Joint Ex. 5) One of the questions aimed at facilitating Ph.D. Graduate Students' self-assessment asks students what they hope to gain from activities like "[t]eaching/mentoring" and "[s]ervice to department, school, or university" and how they will help the student reach their goals. (*Id.* at 3) Through this evaluation and communication tool, Ph.D. Graduate Students and their faculty advisors can ensure that each aspect of the degree program, including Teaching and Research Assistantships, are serving the student's academic and professional development.

Following the RiDE report, a growing number of Duke Ph.D. departments have made an explicit commitment to reemphasize and prioritize the training and professional development of Ph.D. Graduate Students, which includes training and professional development opportunities in teaching and research. (Joint Stip. Attachment C ¶¶ 5, 6) For example, Ph.D. programs have either adopted (or are in the process of adopting) a mentorship statement, summarizing what students can expect from their programs and by which students can hold their faculty advisor and programs accountable. (*Id.* at ¶ 6, Attachments 8-12) These statements generally are publicly available online on a program's website. (*Id.* at ¶ 6) Several Ph.D. programs have also developed public statements concerning the role of teaching and research through assistantships as part of students' doctoral education. (*Id.* at ¶ 7) These statements are the product of a reevaluation of the purpose of Teaching and Research Assistantships—which is to train and advance the education of Ph.D. Graduate Students—and the support the program should provide to its Teaching

Assistants (“TAs”) and Research Assistants (“RAs”). (*Id.*) Programs in the Literature, Mathematics, and English departments have adopted such statements on pedagogy.⁶ (Joint Stip. Attachment C ¶ 7, Attachments 13-15)

B. Teaching is an Integral Component of a Duke Ph.D. Graduate Student’s Education

At Duke, learning to teach and to evaluate student work is fundamental to the education of graduate students and their preparation for careers in teaching and scholarship. (Joint Stip. Attachment A at 9; Joint Ex. 17 at Ch. 12 p. 20) Indeed, one of the four core components of graduate education at Duke, as emphasized in the Core Expectations, is “preparation for and experience in a variety of teaching roles.” (Joint Stip. Attachment C at Attachment 26) Teaching skills are stressed, for among other reasons, because they enable students to convey complex ideas to a wide audience. (Joint Ex. 4) This ability is transferrable not only to future positions in academia, but also to careers in industry, non-profit organizations, and elsewhere. (*Id.*)

1. Teaching Assistantships Provide Valuable Teacher Training to Graduate Students

⁶ The Literature Department’s Guide on Research (or Graduate) and Teaching Assistantships provides: “The purpose of the Research Assistantship... is to offer students the opportunity to build and refine necessary research skills (e.g., organizational, management, and editorial competence, training in collaborative work, but also intellectual development)... The purpose of the Teaching Assistantship is to offer students the opportunity to gain experience in the classroom and to build and refine their skills as teachers, graders, discussants, and advisors.” (Joint Stip. Attachment C at Attachment 13)

The Mathematics Department’s statement on teaching—titled “Mathematicians Teach”—states that “[t]eaching is an important and enriching component of academic scholarship. Learning to teach a valued component in the education of our mathematics graduate students and being a teaching assistant is a critical part of both their professional development and financial support.” (Joint Stip. Attachment C at Attachment 14)

The English Department’s statement on “Pedagogy” states: “The department takes very seriously its mission to train graduate students as teachers as well as scholars and intellectuals, and to make pedagogy a lively and integrated aspect of departmental culture.” (Joint Stip. Attachment C at Attachment 15)

Teaching Assistants assist with all aspects of teaching. As stated in the Core Expectations, this includes “course development, lecture preparation, classroom communication, examining, and grading.” (Joint Stip. Attachment C at Attachment 26) They grade papers and examinations, conduct tutorials, hold office hours and review sessions, attend lectures, and lead discussion sections. (Joint Stip. Attachment A at 11; Joint Ex. 4) Undertaking these responsibilities as a Teaching Assistant is especially valuable for the many Ph.D. Graduate Students who seek future careers in higher education. (Joint Exs. 4, 17 at Ch. 12 p. 20)

Although service as a Teaching Assistant or in some other instructional position is a critical component of a doctoral education, the Graduate School has imposed a 19.9 hours per week limitation on such activities to ensure a balance between teacher training on the one hand, and dissertation/coursework on the other. (Joint Stip. Attachment A at 7; Joint Ex. 4) The Graduate School is charged with monitoring and enforcing this cap. (Joint Stip. Attachment C at Attachment 26) In some cases—such as with “[g]rader assignments,” which “typically require a few hours per week on average”—students spend significantly fewer than 19.9 hours per week fulfilling Teaching Assistant responsibilities. (Joint Ex. 4)

Through their experience as Teaching Assistants, Ph.D. Graduate Students are afforded opportunities to acquire knowledge in areas within their disciplines, but beyond the specific focus of their dissertation research. (Joint Stip. Attachment A at 12) This experience is invaluable when students enter the job market. Additionally, teaching experience prepares Ph.D. Graduate Students for work outside academia, as the ability to convey complex information in a clear and effective manner is essential in most any professional endeavor. (Joint Ex. 4)

2. The Graduate School’s Teaching Programs

Ph.D. Graduate Students are encouraged to participate in one or more teacher training programs offered by the Graduate School as an integral part of their academic experience (Joint Exs. 4, 17 at Ch. 12), including:

- The Certificate in College Teaching (CCT) Program is designed to provide Ph.D. Graduate Students with a foundation for learning how to teach in a college or university setting. (Joint Stip. Attachment C at Attachment 28) Students participating in the program must complete coursework on college teaching, gain teaching experience, both observe and be observed by peers, and complete an online teaching portfolio. (Joint Stip. Attachment A at 9; Joint Stip. Attachment C at Attachment 28).
- The Preparing Future Faculty (PFF) Program provides an opportunity for Ph.D. Graduate Students to learn about faculty roles and responsibilities through regular interaction with faculty mentors at five partner institutions in North Carolina. (Joint Stip. Attachment A at 10; Joint Stip. Attachment C at Attachment 29)
- Bass Instructional Fellowships are competitive fellowships awarded each year to Ph.D. Graduate Students seeking to gain substantive pedagogical experience as: Bass Instructors of Record to design and teach their own course; Bass Instructional Teaching Assistants for students in departments with limited teaching opportunities; or Bass Digital Education Fellows to help design and produce Massive Online Open Courses, free online classes that are open to the public. (Joint Stip. Attachment A at 10; Joint Stip. Attachment C at Attachment 30)

Participation in the PFF and CCT programs is noted on student transcripts, and students who complete the CCT program receive a certificate upon graduation. (Joint Stip. Attachment A at 10)

The Graduate School offers a number of other programs on teaching and research to assist Ph.D. Graduate Students in their job search upon graduation. (Joint Stip. Attachment C at Attachments 31–33; Joint Ex. 6) For example, the Graduate School offers a Professional Development Series of workshops and panel discussions. (*Id.*) The Series seeks “to help graduate students broaden their career perspectives and core competencies.” (Joint Stip. Attachment C at Attachment 31; Joint Ex. 6) Additionally, the Graduate School has a Professional Development Blog, where graduate students are encouraged to share their professional development

experiences. (Joint Stip. Attachment C at Attachment 32; Joint Ex. 6) Finally, the Graduate School puts on College Teaching Workshops, designed to assist Ph.D. Graduate Students in improving their teaching skills. (Joint Stip. Attachment C at Attachment 33)

3. Departmental Requirements for Training Graduate Students in Teaching

Graduate departments must “provide a range of teaching opportunities relevant to likely career prospects” for students (Joint Stip. Attachment C at Attachment 26), and Ph.D. programs are instructed by the Graduate School to “ensure that each TA has the training necessary to be successful.” (Joint Ex. 4) “To enhance the training and teaching experience of graduate students,” Ph.D. programs are charged with providing “graduate TAs with faculty teaching mentor(s) who can provide ongoing guidance during their appointment.” (*Id.*) In turn, each program approaches the training of graduate student teachers in discipline-specific ways.

Of the more than 50 Ph.D.-offering academic departments and programs at Duke, most treat service as a Teaching Assistant as part and parcel of the academic degree program, and either encourage or require teaching as part of a student’s progress in completing their degrees.⁷ (Joint Stip. Attachment A at 13) There are several Ph.D. programs, primarily in the Biomedical Sciences and Engineering, where Ph.D. Graduate Students’ funding primarily comes from the Research Assistantship budget but are nonetheless required to complete a Teaching Assistantship. (Joint Stip. at ¶ 5(r); Joint Stip. Attachment A at 13)

Many departments offer standalone courses that explore pedagogical techniques specific to certain disciplines, such as “Teaching College Mathematics,” and “Theories and Techniques of Teaching Foreign Languages.” (Joint Ex. 17 at Ch. 12 p. 28) There are over 20 such courses

⁷ Despite conflicting testimony reflected in the 2017 DDE, it is clear that teaching is an academic degree requirement in the Romance Studies, Religion, and Mathematics departments. (Joint Exs. 14, 15; Joint Stip. Attachment C at Attachment 14)

offered across the more than 50 departments. (*Id.*) Some Graduate School academic departments have established guidelines as to which semesters Ph.D. Graduate Students are eligible to serve as TAs, while others do not. (Joint Stip. Attachment A at 14) For example, to fulfill the Teaching Assistant requirement for a doctoral degree in Biochemistry, students must serve as a TA during their second year of study. (*Id.*) By contrast, in Biomedical Engineering, where Ph.D. Graduate Students must teach two semesters to meet academic requirements for graduation, the department does not specify when. (*Id.*)

Because Ph.D. Graduate Students are not expected to be effective Teaching Assistants upon arrival at Duke, doctoral students can expect to “receive appropriate training” as well as “an appropriately sequenced variety of teaching opportunities relevant to their career expectations and likelihoods.” (Joint Stip. Attachment C at Attachment 26) For example, in the Romance Studies Department, students enter a pedagogy training program beginning in the second semester of the second year—which includes a course on teaching methods, instructorship in the language program, and a Teaching Assistantship—before students have the opportunity to teach a course of their own design in their fifth year. (Joint Ex. 14) Students in the English Department must complete a “Teaching Apprentice” program during their first two years, in which they observe two undergraduate courses and meet weekly with the professors to discuss pedagogical issues. (Joint Stip. Attachment A at 14; Joint Ex. 16) For their third through fifth years, these students will serve either as a TA or Instructor-of-Record for a course.⁸ (*Id.*)

⁸ The centrality of the teaching experience to the English Ph.D. Graduate Student’s degree program, as evidenced by the deliberate approach to pedagogy training, is described in the department’s handbook for Ph.D. Graduate Students: “The department takes very seriously its mission to train you as a teacher as well as a scholar and an intellectual, and to make pedagogy a lively and integrated aspect of departmental culture. You will follow a carefully designed pattern of teacher-training which includes unique opportunities to work with faculty in the classroom,

In the Engineering School, Ph.D. Graduate Students are required to attend a teaching orientation before serving as a TA. (Joint Stip. Attachment A at 13) The orientation addresses communication skills, interaction with students, conducting effective discussion sections, and grading techniques. (*Id.*) Engineering students are required to take a seminar on teaching concurrently with each of their TA appointments, providing additional pedagogical instruction and a venue in which to discuss and improve upon their teaching experiences. (*Id.* at 13-14)

C. Research is Also an Integral Component of the Completion of a Ph.D. Degree

Like teaching, research is another critical component of earning a Ph.D. at Duke. (Joint Stip. Attachment C at Attachment 26) As explained in the Core Expectations, Duke is committed to ensuring that each graduate student engages in “development of an individual research agenda.” (*Id.*) Graduate students at Duke are expected to “learn the research methods and historical knowledge bases of the discipline ... [and] to discover and pursue a unique topic of research in order to participate in the construction of new knowledge in the chosen field and application of that knowledge to new problems/issues.” (*Id.*) Through Research Assistantships and a centrally administered Responsible Conduct of Research program, Duke enables Ph.D. Graduate Students to achieve that expectation.

1. Ph.D. Graduate Student Research Assistantship Assignments

For many Ph.D. Graduate Students serving as Research Assistants, their dissertations are fundamentally intertwined with the research project on which they are assisting. (Joint Stip. Attachment A at 11, 16; Joint Stip. Attachment D) Students serving as Research Assistants on research related to their dissertations are not subject to any weekly hour limitation on that

participate in the Thompson Writing Program, teach core English Department courses, and design your own first year literature seminar.” (Joint Ex. 16)

research. (Joint Stip. at ¶ 5(v); Joint Stip. Attachment A at 7) Ph.D. Research Assistants are paired with a faculty advisor or faculty member serving as a principal investigator (“PI”), who serves to advise and train the Research Assistants in the techniques of their field. (Joint Stip. Attachment A at 11, 15-16; Joint Stip. Attachment C at Attachment 13) For example, guidance from the Literature Department makes clear that faculty advisors are “responsible for providing a first point of contact for advising the RA student” and should provide guidance with respect to the student's coursework, program logistics, and “methodological practices in their area of research interests.” (Joint Stip. Attachment C at Attachment 13)

Among other things, Research Assistants in the Humanities and Social Sciences engage in research projects and write papers with faculty advisors. (Joint Stip. Attachment A at 11) These projects train students in methods of scholarly research, *e.g.*, conducting literature reviews, researching primary texts, creating indices for published works, *etc.*, under a professor’s guidance.⁹ (Joint Stip. Attachment A at 11; Joint Stip. Attachment C at Attachment 13; Joint Stip. Attachment D, Declaration of Griffin Riddler)

Many students appointed as Research Assistants are enrolled in the Engineering and Biomedical Sciences. (Joint Stip. Attachment A at 15) In the Engineering School, Ph.D. Graduate Students apply for admission to work with, and are then admitted to work with, a particular faculty member. (*Id.* at 17) For their entire course of study, most of these students learn research skills and techniques in the same faculty member’s laboratory. (*Id.* at 18) Ph.D.

⁹ As outlined in the Core Expectations, graduate faculty are charged with “provid[ing] intellectual guidance and rigor in students’ educational programs and on specific research projects;” “provid[ing] students with knowledge of the current frontiers and opportunities in disciplinary and inter-or cross-disciplinary research;” and “respect[ing] students’ research interests/goals and [] assist[ing] students in pursuing/achieving them.” (Joint Stip. Attachment C at Attachment 26)

Research Assistants typically pursue a dissertation topic that closely relates to the research being conducted in the lab or research group with whom they are paired. (*Id.* at 16) Thus, the time spent in the laboratory is dedicated to furthering both the research of the lab as well as the student's own dissertation research. In fact, doctoral student Austin Wadle confirmed as much in his declaration, stating that "[m]uch of the research [he does] in the laboratory is relevant to [his] dissertation..." (Joint Stip. Attachment D, Declaration of Austin Wadle at ¶ 4)

Similarly, Ph.D. Graduate Students in the Medical School engage in laboratory research directly related to the grant of their faculty advisor. (Joint Stip. Attachment A at 16; Joint Stip. Attachment D, Declaration of Thomas Nguyen) During their first year, students in the Medical School rotate between laboratories. (Joint Stip. at ¶ 5(z); Joint Stip. Attachment A at 18) At the end of their first year, each Ph.D. Graduate Student is expected to affiliate with a laboratory where they will spend the next two to five years researching under the guidance of the PI for that laboratory. (*Id.*) Like their engineering Ph.D. colleagues, biomedical Ph.D. students' research in the lab and their dissertation research are closely related. (Joint Stip. Attachment A at 16; Joint Stip. Attachment D, Declaration of Thomas Nguyen)

2. Research Training Administered by the Graduate School

Duke takes seriously its obligation to train all Ph.D. Graduate Students in ethical research practices. (Joint Ex. 17 at Ch. 12) Every doctoral student is required to complete a Responsible Conduct in Research ("RCR") orientation, and to complete additional hours of RCR training during their first three years of study. (*Id.* at Ch. 12 p. 14-15; Joint Stip. Attachment A at 10) The requirement can be met by attending RCR Forums, *i.e.*, two-hour workshops, offered each semester, on a wide range of topics. (Joint Ex. 17 at Ch. 12 p. 15; Joint Stip. Attachment C at Attachment 34) This hands-on ethical research training is evidence of Duke's commitment to training its students as ethical researchers. (Joint Ex. 17 at Ch. 12 p. 12-13)

III. Financial Support for Ph.D. Graduate Students at Duke

A. Financial Aid at Duke

Full-time doctoral students pay no tuition or fees through at least the first five years of study. (Joint Stip. Attachment A at 4) The Graduate School commits to fully supporting all Ph.D. Graduate Students during their guaranteed funding period provided the student makes satisfactory progress toward their degree. (Joint Ex. 17 at Ch. 4 p. 3) Since 2016, Duke has made key structural changes in its Ph.D. funding structure. (Joint Stip. Attachment C at ¶ 9) Starting in the 2022-2023 academic year, all Duke Ph.D. Graduate Students in their five-year guaranteed funding period will receive 12-month funding support, meaning students in programs that historically provided nine-month stipends will now be guaranteed sources of summer funding that provide a full stipend and coverage of tuition and mandatory fees during the three summer months, starting in summer 2023. (Joint Stip. Attachment C at ¶ 1, Attachment 23)

Beginning in the Fall 2017 semester, the University provides tuition scholarships for Ph.D. Graduate Students in their sixth year who do not have other external or departmental tuition support. (Joint Stip. Attachment C at ¶ 9, Attachment 18) Previously, only some Ph.D. programs guaranteed Ph.D. Graduate Students a sixth year of funding, although most departments financially supported their students through a sixth year of study as long as the student continued to make academic progress. (Joint Stip. Attachment A at 4) The only eligibility criteria for a sixth-year tuition scholarship is that a Ph.D. student applied for but did not receive any external funding or other competitive fellowships from the Graduate School. (Joint Stip. Attachment C at ¶ 9, Attachment 18) The Graduate School continues to offer fellowships for students in their sixth or subsequent years. (Joint Stip. Attachment A at 4)

In light of the impact the COVID-19 pandemic had on a number of Duke's Ph.D. Graduate Students, the University created a mechanism by which students could apply for

extensions to their standard funding package.¹⁰ (Joint Stip. Attachment C at ¶ 10, Attachment 19) First, students whose progress had been seriously affected by the pandemic were able to apply for a scholarship that would cover tuition and mandatory fees for year seven of their Ph.D. program, for either a semester or a full year, depending on the severity of the delay. (*Id.*) Additionally, as part of Duke’s COVID-19 response, students whose progress had been seriously affected by the pandemic could apply for an extension in stipend for year six of their Ph.D. program, for either a semester or a full academic year, depending on the severity of the delay. (*Id.*)

Ph.D. Graduate Students receive a guaranteed stipend for five years. (Joint Stip. Attachment A at 4) The amount of the yearly stipend is set by the Graduate School. (Joint Stip. Attachment A at 5; Joint Stip. Attachment C at Attachment 22) In academic year 2022-2023, all Ph.D. Graduate Students received an equalized stipend of \$33,660 and a \$1,000 Cost of Living Adjustment in September 2022. (Joint Stip. at ¶ 5(i)) Ph.D. Graduate Students may be supported in a number of ways—“[f]unding may be in the form of fellowships, teaching or research training, or some combination of fellowship and training.”¹¹ (Joint Ex. 17 at Ch. 4 p. 3) Doctoral

¹⁰ The Graduate School also extended the deadline for completing preliminary examinations by a full semester and adopted a flexible approach to the timing of thesis defenses. (*Id.*)

¹¹ The University technically processes stipend disbursements differently depending on whether a stipend is funded by a fellowship or by a Teaching or Research Assistantship in order to comply with IRS regulations. The portion of a Ph.D. Graduate Student’s stipend funded by a fellowship is coded as a “non-compensatory” payment while the portion of a student’s stipend funded by an assistantship is coded as a “compensatory” payment. (Joint Stip. Attachment A at 5-6) As explained in the DGS Manual:

Scholarships and fellowships are considered to be income under the Tax Reform Act of 1986. Students may exclude from this income the amount of the award paid for tuition and course-required fees, books, supplies and equipment. While students must report fellowship stipend distributions as income, there are no withholding or reporting requirements for the University...

students may be funded through a competitive fellowship sponsored by the University or by an external source. (*Id.*) Other Ph.D. Graduate Students, particularly those in the Biomedical Sciences programs, are supported on institutional training grants for the first year of study and then, in subsequent years, through Research Assistantships funded by an advisor's research grant or other institutionally funded research projects. (*Id.*) For Ph.D. Graduate Students who receive outside funding, some grants are paid directly to the student and not distributed to the University. (Joint Stip. at ¶ 5(o)) Regardless of the source of funding, all Ph.D. Graduate Students receive a stipend that meets or exceeds the minimum stipend level established by the Graduate School.¹² (Joint Ex. 17 at Ch. 4 p. 4)

Teaching and Research Assistantships are included in financial aid packages for students, and are considered part of those students' academic program. (Joint Stip. Attachment A at 19; Joint Exs. 14-16) The portion of a student's stipend allocated to a Teaching or Research Assistantship is neither lost nor reduced because of poor performance as a TA or RA. (Joint Stip. at ¶ 5(cc))

Research or teaching stipends, however, are subject to federal and state income taxation, even if the training is a requirement for the degree... Registered students are not required to pay FICA (i.e., Social Security and Medicare) taxes nor does the University contribute the employer share. In order to remain exempt from payment of FICA taxes, students must remain registered for all semesters in which they are receiving compensatory stipends.

(Joint Ex. 17 at Ch. 4 p. 8) Thus, the University must comply with state, local, and federal tax regulatory regimes and processes student stipend support accordingly.

¹² The Graduate School permits Ph.D. programs to provide stipends that are greater than the established minimum amount. (Joint Ex. 17 at Ch. 4 p. 4) Ph.D. Graduate Students may also seek to supplement their stipends through, among other sources, additional Teaching and Research Assistantships, provided that the student's effort is not more than 19.9 hours per week. (Joint Stip. Attachment C at Attachment 24)

1. Stipend Support Continues Regardless of Service as a Teaching or Research Assistant

The amount of a student's stipend is not affected by whether the student is serving as a Teaching or Research Assistant. (*Id.*) Students receive the same stipend amount from year to year, across the Graduate School, subject to cost of living adjustments, even though in many departments the teaching or research expectations/ requirements may increase or decrease from one year to the next. (Joint Stip. Attachment C at Attachment 22; Joint Stip. Attachment A at 5, 14; Joint Exs. 14-17) In the Medical School, for example, although students are not engaged in research for their first year of study, and from years two through five are expected to conduct laboratory research, they receive the same pre-determined stipend each year, without regard to the number of hours spent in the lab. (Joint Stip. Attachment A at 18-19; Joint Stip. at ¶ 5(z); Joint Stip. at Attachment C at Attachment 26) Sometimes—in the Medical School, for example—a student may be expected to serve simultaneously as a Teaching and Research Assistant. (Joint Stip. at ¶ 5(r)) While these students are primarily funded through a Research Assistantship, they are also required to complete a Teaching Assistantship, purely as part of their academic program and not as part of their financial package. (*Id.*) Thus, even when serving in both positions at the same time, there is no effect on the stipend amount. (*Id.* at ¶¶ 5(r), 5(i); Joint Stip. Attachment C at Attachment 22) And, during a semester or academic year when a student is not able to or not expected to teach, their stipend continues nevertheless at the same, Graduate-School recommended level. (Joint Stip. at ¶ 5(cc); Joint Ex. 17 at Ch. 4) There is no relationship between stipend amount and instructional or research services performed.

When a Ph.D. Graduate Student is expected by their department or program to serve as a Teaching or Research Assistant but is unable to do so, the Graduate School's policy is that the student still must receive their full stipend for that semester. (Joint Stip. at ¶ 5(cc)) Reduction of

funding is not permitted. (*Id.*) In the rare instance when it has come to the Graduate School's attention that a department attempted to reduce a stipend because the student was unable to serve as a TA, the Graduate School has required the department to make the student whole. (*Id.*)

If a Research Assistant is funded by a research grant and the grant is either not renewed or lost or for other reasons the student leaves the lab, the Graduate School has a "backstop policy" under which the student still receives funding, from either the department or the Graduate School itself. (Joint Stip. Attachment A at 17; Joint Stip. at ¶ 5(y); Joint Stip. Attachment C at Attachment 35) In the Engineering School, if a student discontinues service as an RA for their faculty advisor and is no longer funded, the department will assume responsibility for funding tuition and stipend until another faculty advisor can be found, in accordance with the Graduate School's backstop policy. (Joint Stip. Attachment A at 18; Joint Stip. at ¶ 5(y); Joint Stip. Attachment C at Attachment 35)

2. Financial Support Through Expanded Fellowships and Professional Development Assistantships and Internships

One of the most significant outcomes from the RiDE report has been the concerted efforts of the Graduate School, the Office of the Provost, and individual Ph.D. programs to prioritize student training and professional development, in part, by expanding the number of summer funding, training, and professional development opportunities available to Ph.D. Graduate Students. (Joint Stip. Attachment C ¶ 2) In furtherance of its commitment to provide 12-month funding to all Ph.D. Graduate Students, Duke provides a robust set of opportunities for summer funding of Ph.D. Graduate Students, each related to important aspects of Ph.D. training. (*Id.*, Joint Stip. Attachment C at Attachment 3) The most common are: research fellowships and assistantships, whether from the Graduate School, faculty supervisors, or individual Ph.D. programs; or experience with teaching and mentoring, especially through opportunities to serve

as instructor of record in summer session courses or as project managers in summer programs for undergraduates. (*Id.*) For example, the Provost's Office now offers Reimagining Doctoral Education (RiDE) Graduate Assistantships to enable Ph.D. programs to implement the recommendations made in the RiDE report and support Ph.D. Graduate Students in a research project of their own design in pursuit of a research question of personal interest. (Joint Stip. Attachment C ¶ 2)

The University's Office of the Provost supports an array of fellowships, funded internships, and professional development assistantships for Ph.D. Graduate Students, offering Ph.D. Graduate Students mentored internship experiences curated by the University that provide additional training in areas of interest that are complementary to the Ph.D. program. (Joint Stip. Attachment C ¶ 3, Attachment 3) For example, the Provost's Office now offers competitive Graduate Student Training Enhancement Grants (GSTEG) for Ph.D. Graduate Students who wish to pursue a summer internship outside of the University. (Joint Stip. Attachment C ¶ 3, Attachment 4) The goal of this grant competition is to expand opportunities for Ph.D. Graduate Students to augment their core research and training by acquiring additional skills, knowledge, or experiences, whether in academia or beyond, through an off-campus summer internship. (*Id.*) The University has made a significant investment in developing and administering these programs for the benefit of Ph.D. Graduate Students as scholars in training. (Joint Stip. Attachment C ¶ 3) Fellowships, assistantships, and internships are intended to enable students to further develop the skills necessary for their chosen career path as well as identify which career path is right for them. (*Id.*)

B. Benefits for Ph.D. Graduate Students at Duke

Doctoral students' benefits differ significantly from benefits provided to Duke employees. (Joint Stip. ¶ 5(f)) The University pays full tuition and fees for every Ph.D. Graduate

Student through at least the first five years of study, and provides sixth year tuition scholarships for students without other sources of tuition support. (Joint Stip. Attachment A at 4; Joint Stip. Attachment C at Attachment 18) Tuition and stipend support is conditioned on students remaining in good academic standing and making satisfactory progress toward their degree (Joint Exs. 3, 17) Ph.D. Graduate Students receive guaranteed free coverage under the Student Medical Insurance Plan (“SMIP”) for six years. (*Id.*) The University also pays the dental insurance premiums of all Ph.D. Graduate Students for six years. (Joint Stip. Attachment C at Attachment 25) All Ph.D. Graduate Students are also eligible for the following benefits, among others, whether or not they are serving as a Research or Teaching Assistant in any particular semester:

- A Child Care Subsidy of up to \$7,000 per year to help defray childcare costs, and nine weeks of paid parental leave (*Id.*; Joint Stip. at ¶ 5(g));
- A Medical Assistance Program, which provides Ph.D. Graduate Students with up to \$10,000 for medical expenses not covered by SMIP (*Id.*) and up to \$5,000 for non-medical hardships (Joint Stip. Attachment C at Attachment 25); and
- Short term loans of up to \$2500 at competitive interest rates offered through a program negotiated between the Graduate School and the Duke Credit Union, and emergency loans of up to \$1,000 from an endowment earmarked specifically for loans to Graduate Students. (Joint Stip. Attachment A at 4)

In Spring 2022, the Graduate School formed the Ph.D. Stipend Task Force to address cost of living challenges facing doctoral students. (Joint Stip. Attachment C at ¶ 8) The Task Force—comprised of representatives from the Graduate School and the schools that house Ph.D. programs as well as graduate students—issued a final report in August 2022 that summarized the committee’s findings and made recommendations to University administration on how best to address these challenges. (*Id.*, Joint Stip. Attachment C at Attachment 16) The Graduate School accepted each of the Task Force’s recommendations and has since implemented a number of the action items identified in the report, including:

- A \$1,000 cost of living payment distributed to Ph.D. Graduate Students in October 2022;
- Increasing the full-year Ph.D. stipend for the 2023-2024 academic year by 13%;
- Providing a one-time \$800,000 contribution to support hardship assistance (including the childcare subsidy and medical expense fund), additional academic-year dissertation travel awards, and professional development resources (e.g., training opportunities and online career development tools);
- Standardizing graduate student parking rates to the level of undergraduate parking rates and reducing annual parking permit rates for graduate students by 41%; and
- Securing additional subsidized housing options for Ph.D. Graduate Students.

(Joint Stip. Attachment C at ¶ 8, Attachment 16, 17)

The University also makes a significant investment in a variety of programming for its Ph.D. Graduate Students, by virtue of their status as students, regardless of whether students serve as a Teaching Assistant or Research Assistant. (Joint Stip. Attachment C at ¶ 4) Since 2018, the Provost’s Office has created a number of new initiatives and programs for Ph.D. Graduate Students. (*Id.*) For example, the Provost’s Office expanded interdisciplinary coaching and mentoring opportunities with peer and alumni mentoring networks. (*Id.*, Joint Stip. Attachment C at Attachment 5) The Provost’s Office also created the Duke Graduate Academy, through which graduate students have access to free online short courses that help emerging scholars prepare for high-level research, innovative teaching, leadership, and/or public engagement. (Joint Stip. Attachment C at ¶ 4, Attachment 6) After receiving a \$1 million grant from the Alfred P. Sloan Foundation in 2017, Duke established the University Center of Exemplary Mentoring (“UCEM”) at Duke, expanding Duke’s capacity to attract, retain, and graduate STEM doctoral students from underrepresented minorities. (Joint Stip. Attachment C ¶ 4, Attachment 7) In addition to awarding scholarships to incoming students in select Ph.D.

programs, the UCEM offers programming and resources designed to help Sloan Scholars as well as other graduate students at Duke fully integrate into the Duke research community. (*Id.*)

While University employees are provided benefits like personal time off, medical care, and tuition assistance, employee benefits are markedly different from the benefits provided to Ph.D. Graduate Students by virtue of their enrollment as students in Duke's Ph.D. program. (Joint Ex. 12) Moreover, Ph.D. Graduate Student benefits are provided through the Graduate School, not Duke's Human Resources and Benefits Departments, which administer benefits for the University's employees. (Joint Stip. Attachment A at 4)

IV. Critical Conclusions of The 2017 DDE Do Not Reflect Today's Duke Ph.D. Program

The 2017 DDE made a number of factual findings that are no longer, if they were ever, an accurate account of Duke's Ph.D. program. Indeed, the Union stipulated to at least 31 changes to the 2017 DDE. These changes, many as a result of the RiDE effort, demonstrate that teaching and research as part of an assistantship are part and parcel of Duke's doctoral academic program, and are required or encouraged for the academic and professional benefit of Ph.D. Graduate Students. These changes underscore the fundamental academic, not employee, relationship between Duke and its Ph.D. Graduate Students.

A. Appointment and Reappointment Letters

In the 2017 DDE, the Regional Director placed significant weight on the fact that University documents, including appointment and reappointment letters, refer to stipends sourced by Teaching and Research Assistantships as "salaries" or "compensation," and to the teaching and research services performed by Ph.D. Graduate Students as "work." The Regional Director also gave undue consideration to sample appointment and reappointment letters from various Ph.D. programs that detailed—some in a less than artful way—each recipient student's financial aid package and assistantship requirements. As stipulated by the Union, "[t]he

admission and readmission letters discussed in the DDE existed for the 2016-2017 academic year,” and the letters cited by the Regional Director in his 2017 DDE are no longer relevant or applicable.

Since 2017, the Graduate School has updated its template appointment letters for newly admitted doctoral students enrolling over the past six years. The Research Assistantship Letter informs students that they “will receive a first-year research assistantship that consists of a tuition and fee scholarship, student health and dental insurance coverage, and a stipend.” (Joint Ex. 17, Ch. 3 at 23) The Teaching Assistantship Letter explains to students that, “[a]s part of Ph.D. training, we believe one needs to practice the art of teaching by being a teaching assistant. Your department will provide more information on teaching assistant expectations as well as other particulars specific to your department.” (*Id.* at 27)

Moreover, while the University strongly maintains that the mere borrowing of terms from the employment nomenclature (*i.e.*, words such as “work” or “salary”) is not—and cannot be—“proof” that an employment relationship exists, the letters stipulated by the University and the Union (the “Parties”) to be a representative sample of recent appointment and reappointment letters across several Ph.D. programs reflect the purely administrative and communicative purpose of these letters. The appointment and reappointment letters issued by the Ph.D. programs for the 2022-2023 academic year provide a brief overview of the recipient’s financial aid package for the current year and, in some letters, what the student may expect in terms of funding sources and requirements in subsequent years in their program. (Joint Stip. Attachment B) Following IRS and tax authority requirements, most, if not all, letters explain that the “non-compensatory” portion of the student’s stipend funded through a fellowship will be “paid” in a certain number of monthly installments on the last “workday” of the month while the

“compensatory” portion of the student’s stipend funded through a Teaching or Research Assistantship will be “paid” in a certain number of monthly installments on the 25th of each month. (*Id.*) Some letters explain the program requirements or expectations with respect to teaching, and some letters even emphasize the importance of teaching experience to the student’s academic training. (*Id.*) While some letters state that students will need to provide proof of “employability” in order to accept a Teaching or Research Assistantship, each letter clearly explains that this is an external requirement imposed by federal government regulations over which the University has no input or control.

Specific language in the appointment and reappointment letters cited in the 2017 DDE no longer exists. For example, letters issued by the Romance Studies department no longer state that a Teaching or Research Apprenticeship “pays your work” as a Teaching or Research Assistant for a specified number of hours each week. (Joint Stip. Attachment A at 20; Joint Stip. Attachment B)

B. Ph.D. Graduate Student Experience

1. New Ph.D. Graduate Student Declarations

The 2017 DDE was based, in large part, on the testimony of a few Ph.D. students about their individual, personal experience within Duke’s doctoral education program. These accounts are not part of the Stipulated Record, and the Union has submitted new declarations from several Ph.D. students, which the Parties stipulated into the record. (Joint Stip. at ¶ 7; Joint Stip. Attachment D)

While it would be error to rely on unique, personal student experiences to make broad, generalized findings about the University’s Ph.D. program, the current student declarations (submitted as Attachment D to the Joint Stipulation) contradict a key finding in the 2017 DDE—that while “[m]ost students TA in courses within their department or in a related department[,] []

students can and do TA courses that are unrelated to their dissertation or academic focus.” (Joint Stip. Attachment A at 12) The present-day experiences of Duke’s Ph.D. Graduate Students demonstrate that this is no longer the case and further prove Duke’s point—Ph.D. Graduate Students who provide instructional or research services through an assistantship do so as part of their academic program.

The Ph.D. Graduate Student declarations included in Attachment D to the Joint Stipulation demonstrate that TAs and RAs perform teaching and research services that are related to their field of study. For example, one student stated that his dissertation concerns “economic planning for ecosystem restoration in Brazil,” and that he had previously served as a TA in a number of courses, including graduate-level courses on “environmental economics.” (Joint Stip. Attachment D, Declaration of Matthew Reale-Hatem) In the current semester, he is serving as an instructor of record in his course called “Principles of Economics and the Environment.” (*Id.*) His teaching experiences are clearly connected to his field of study in environmental economics.

Several of the Ph.D. Graduate Students baldly assert that their experiences as a TA were irrelevant or unrelated to their dissertation. (Joint Stip. Attachment D) The facts belie these contentions, however. Considering the students’ broader Ph.D. disciplines—rather than their niche academic subspecialty—it is obvious that their experiences are closely related to and integral parts of the students’ holistic academic program and the completion of their Ph.D. degrees. For example, two English Ph.D. Graduate Students conclusively assert, without any explanation, that the courses in which they serve(d) as a TA were not relevant to their dissertation. (Joint Stip. Attachment D, Declarations of Hunter Augeri and Matthew Thomas) In his declaration, Mr. Augeri describes his academic area of interest as “20th Century American

literature, art, and culture,” and states that he is currently serving as a TA in an “undergraduate film class” that is supposedly not relevant to his dissertation.¹³ (Joint Stip. Attachment D, Declaration of Hunter Augeri) Similarly, English Ph.D. student Matthew Thomas asserted that his TA experience in a course titled “Masterpieces of World Literature” somehow is not related to his research interests or dissertation work, which he described as being focused on “20th Century American Literature.” (Joint Stip. Attachment D, Declaration of Matthew Thomas)

The simple fact is both of these teaching experiences are considered by Duke’s English Department to be necessary components of the English Ph.D. academic program and satisfy requirements for completing the doctoral degree. The Student Handbook published by the English Department for its Ph.D. students, and stipulated as part of the record by the Parties, states that, as a course requirement, students should expect to be exposed to, among other things, “[m]aterials from different centuries,” “[t]exts not only from both the British and American national literatures but also from Anglophone literature,” and “[a] range of literary genres, media, and cultural studies.” (Joint Ex. 16 at 1) Further, the handbook provides that “[s]uch diversified study should take place not simply in course work, but more comprehensively, across coursework including...teaching experiences.”¹⁴ (*Id.*) Thus, even if the teaching experiences in

¹³ Mr. Augeri previously served as a Teaching Assistant in an undergraduate seminar on Bob Dylan and as an instructor of record in a course called “Cults and Conspiracies.” (Joint Stip. Attachment D, Declaration of Hunter Augeri) Mr. Augeri did not assert that these teaching experiences were irrelevant to his dissertation, nor does he explain how film is not part of “literature, art, and culture.”

¹⁴ The English Department handbook also outlines the specific course requirements each doctoral student must complete to earn their Ph.D. degree in English, explaining that students must complete 22 learning opportunities in six of ten listed categories spanning different time periods, genres, and media. The ten categories are: “Medieval; Renaissance; 18th Century British; 19th Century British: Romanticism or Victorian; Pre-Civil War American; Post-Civil War American; 20th Century and Contemporary Literatures: British, Irish, American, Post-colonial, Comparative; Genre: the Novel, Drama, Lyric Poetry, Epic or Romance; Film, Video, New

film and “Masterpieces in Literature” did not fit within each student’s narrow dissertation focus, these experiences satisfy the “diversified field requirements” established by the English Department and are, therefore, related to each student’s general field of study and essential to the completion of the Ph.D. degree program.

Moreover, Duke considers opportunities to develop knowledge in areas within students’ academic disciplines but outside the focus of their dissertation research to be invaluable when students enter the academic job market, as most university-employers seek faculty candidates who are versatile teachers with a broad base of knowledge within and beyond their given fields. Teaching experience also prepares graduate students for careers outside academia—including industry, government, and NGO jobs—as the ability to convey complicated information in a clear and effective manner and to quickly process and respond to questions raised by one’s audience, as well as the communication skills needed to present technical research findings are essential to a Ph.D. in any employment setting. (*See e.g.*, Joint Ex. 4)

The declarations from Ph.D. Graduate Students serving as Research Assistants likewise support the University’s position that RAs perform research for their lab or their faculty advisor that is intertwined with the research performed for their own dissertation. Each student with experience serving as a Research Assistant acknowledged that, in their role as an RA, they have conducted research that is relevant to their dissertation. (Joint Stip. Attachment D, Declarations of Emma Dolan, Thomas Nguyen, and Austin Wadle) While each student qualified that not *all* of their research is relevant to their dissertation, the fact that the research performed pursuant to a grant or for a faculty member’s research project does not completely overlap with each student’s

Technologies; and Literature in another language or Comparative Literature (with a non-Anglophone focus).” (*Id.*)

specific area of interest is neither surprising nor counter to the conclusion that Research Assistants conduct research that is inextricably intertwined with their own research and academic pursuits. Indeed, given that the Ph.D. dissertation is expected to reflect independent and original research by the Ph.D. candidate, it would be undesirable—if not impossible—for there to be complete overlap of a faculty member’s research and the student’s own research pursuits.

2. Stipulated Changes in the Doctoral Student Experience

Aside from the updated appointment and reappointment letters and Ph.D. Graduate Student declarations, the Parties have stipulated to other changes that go to the core of the doctoral student experience and emphasize the point that the DDE findings do not—and should not—bind the Regional Director here.

First, the 2017 DDE stated that “[m]any RAs work 60 hours a week or more in their labs and, depending on the nature of the work they are doing, this may also include nights and weekends.” (Joint Stip. Attachment A at 16) Today, it is clear that 40-60 hours is typical (Joint Stip. at ¶ 5(v)), with most of their research furthering their own dissertation or area of academic interest. It is virtually impossible to separate dissertation and lab work.

The 2017 DDE also stated that, where different labs collaborate on research, “students may be directed to perform work for another lab that does not relate to the work being done in their own labs and would, therefore, not be related to their dissertation research.” (Joint Stip. Attachment A at 16) To the degree that may have been true in 2017, it is not today, as “[s]tudents who serve as RAs may be asked to assist in another lab **that aligns with their research.**” (Joint Stip. at ¶ 5(w)) (emphasis added)

Similarly, while the 2017 DDE stated that TAs who do not perform well are not removed from their position but are counseled by the instructor of the course or by the DGS to help the student improve, the Regional Director erroneously concluded that students may be subject to

negative consequences if they perform poorly, and that this supported a finding that the Ph.D. Graduate Students are employees. (Joint Stip. Attachment A at 14-15, 27) Today, where a student experiences performance issues, the instructor of the course the TA is assisting with or the DGS will get involved to counsel the student and help them improve. (Joint Stip. at ¶ 5(u)) Moreover, and as discussed in detail below, the Graduate School's standard policy is that Ph.D. Graduate Students will not lose their stipend regardless of their performance as a TA or RA. (Joint Stip. at ¶ 5(cc))

C. Reduction of Stipends

In the 2017 DDE, the Regional Director erroneously concluded that Ph.D. Graduate Student stipends are "reduced when they do not perform services." (Joint Stip. Attachment A at 26) It is patently clear that is not the case today.

As the Parties agreed in the Joint Stipulation, "the DDE's discussion of the reduction of stipends reflects the circumstances in 2016" (Joint Stip. at ¶ 5(cc)), and that the testimony of Jennifer Francis, Interim Provost, Suzanne Barbour, Dean of the Graduate School and Vice Provost for Graduate Education, and Shanna Fitzpatrick, CFO and Senior Associate Dean of the Graduate School would demonstrate:

[T]he Graduate School policy is that if a student is expected to perform a teaching assistantship position in a given semester, the student must receive their full funding package each semester even if extenuating circumstances are present (e.g., such as doing research out of the country that semester and not being able to be a teaching assistant). While as a technical matter the funding source would need to change if a student is not teaching, the fellowship amount is increased in the same amount from another funding source so that the student's funding package is made whole. This is the routine response in such a situation. In a rare circumstance where the department does not automatically follow this process and where the Graduate School knows about it, the Graduate School will remedy the situation by immediately having the department make the student whole as discussed. For example, a Music Ph.D. student was not in Durham and unable to teach in person that semester. The department proposed to remove their TA stipend and the Graduate School instructed them to replace it in full from another appropriate funding source. If for whatever reason, the Graduate School is not

immediately made aware, a yearly audit of all Ph.D. stipends is made routinely and identifies inconsistencies. If an error is identified during the course of that audit, the Graduate School will notify the department to rectify the error by automatically direct depositing the missing payment in their monthly disbursement.

(Id.)

The Union's proffered testimony on this point, as provided in the Joint Stipulation, does not undercut the Graduate School's standard policy that departments **may not** reduce Ph.D. Graduate Students' stipends. The Union offers testimony from two individual students who were told by their department that they would not receive the TA portion of their stipend if they did not teach. (Joint Stip. at ¶ 5(dd)) While it is not clear from their declarations whether the TA portion of their stipend was in fact even withheld, or replaced with a different source of funding to make their stipend whole, it does not negate that the Graduate School's policy is that (i) stipends are not reduced where students are not able to perform a Teaching or Research Assistantship; or (ii) the Graduate School enforces this policy once it becomes aware of individual discrepancies.¹⁵

¹⁵ The Union may point to some inartful phrasing in departmental letters to Ph.D. Teaching and Research Assistants to argue that departments reduce student stipends when they are not able to fulfill their assistantship position. The Declaration of Aeran Coughlin highlights language in a letter issued by the Biology Department that contains language that seems to contradict the Graduate School's policy concerning Ph.D. stipends. (Joint Stip. Attachment D) However, it is clear from the policies of the Biology Department that it is committed to prioritizing the effective mentorship of its Ph.D. students and the successful completion of all milestones. The Biology Department's statement on mentorship expectations outlines the mission of the department:

We aim to tailor the mentorship and training of each student toward achieving their career goals. To do this, we seek to communicate expectations more clearly and provide additional resources enabling students to meet those expectations so that every student who enters our doors has an equal opportunity for success in our program and beyond.

(Joint Stip. Attachment C at Attachment 11) To effectuate this mission, the department has established clear instructions, requirements, and expectations of faculty advisors to ensure student success. Thus, it is clear that the Biology Ph.D. program is structured such that students

In sum, these critical distinctions between the 2017 DDE’s conclusions and the stipulated facts present at Duke today further exemplify why Duke’s Ph.D. Graduate Students are students engaged in a holistic academic program, not employees.

ARGUMENT

I. Duke Teaching and Research Assistants Are Not Employees Under the *Columbia* Common Law Agency Test

In *Columbia*, the Board applied the “common law agency doctrine” in reaching its erroneous conclusion that the student assistants in that case were “employees” under Section 2(3) of the Act. *Columbia University*, 364 NLRB 1080, 1083, 1085 (2016). The common law test “generally requires that the employer have the right to control the employee’s work, and that the work be performed in exchange for compensation.” *Id.* at 1094. On that basis, the Board held in *Columbia* that student assistants were statutory employees because they performed teaching and research services directed by the university in exchange for compensation. *Id.* at 1094-95, 1096.

In doing so, the NLRB rejected the standard established decades before in *Adelphi University*, 195 NLRB 639 (1972), *Leland Stanford Junior University*, 214 NLRB 621 (1974), and later refined in *Brown University*, 342 NLRB 483 (2004), which turned on whether graduate assistants are “primarily students and have a primarily educational, not economic, relationship with their university.” *Brown University*, 342 NLRB at 487. Although the Board purported to

will not be “disciplined” when they need further assistance and guidance with respect to their teaching and research skills.

Moreover, the Union has not presented any student who was subject to the “discipline” referenced in the letter from the Biology Department. The record demonstrates that this is mere verbiage and not any student’s lived experience. As discussed at length in this Section, the Graduate School’s policy, which is enforced by way of regular annual audits of student stipends, is that all students are paid the full stipend amount—whether through an assistantship, fellowship, or some other funding source—regardless of their successful service as a TA or RA.

apply the common law test in *Columbia*, the decision actually rested on what it considered the “salient economic character” of the relationship between the student assistants and the university. 364 NLRB at 1095.

The NLRB’s holding in *Columbia* was specific to the facts at that institution. As it said, “[w]e do not hold that the Board is required to find workers to be statutory employees whenever they are common-law employees, *but only that the Board may and should find **here** that student assistants are statutory employees.*” *Id.* at 1083 (emphasis added). In other words, the Board did not make a finding controlling at *all* private universities in the United States, where the facts may be distinguishable from *Columbia*. The holding was limited to the facts before the Board.

The need for a case-by-case analysis was acknowledged recently in *Massachusetts Institute of Technology*, Case No. 1-RC-304042 (2023) (“*MIT DDE*”), where the Regional Director—applying *Columbia*—concluded the “petitioned for fellows’ research might advance the University’s interests as well as their own, particularly where the University’s interests include the broadly defined goal of ‘advancing knowledge’” but the group were not employees because “the compensation received by the fellows is not directly tied to completing particular tasks, as directed; rather it is tied to **maintaining academic good standing.**” *Id.* at 10 (emphasis added). This is true of the Ph.D. Graduate Students at Duke.¹⁶

¹⁶ At the hearing, the Union argued the application of *MIT* was moot because it had amended its petition to remove the category of fellows from the group it seeks to represent. This does not align with the NLRB’s consistent position—the Board does not consider the title of a particular disputed position to be determinative. See *Westinghouse Electric Corporation*, 163 NLRB 723, 726, n.18 (1967) (“[W]e have not regarded as relevant the title held by an engineer on any given work assignment. . . it is clear that an individual’s status under the Act is determined by his job content and responsibilities rather than by his title.”); *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 785 (2003) (status of supervisor under the Act “is determined by an individual’s duties, not by his title or job classification.” *quoting T.K. Harvin & Sons, Inc.*, 316 NLRB 510, 530 (1995)). Hence, it is the students’ “duties”—or lack of them—that distinguishes Duke Ph.D. students from those in *Columbia*.

The facts at Duke in 2016 warranted a finding the graduate students are not employees under *Columbia*. Now, seven years later—and after material changes (many of them stipulated by the Union) to doctoral education at the University—the Ph.D. Graduate Students at Duke are even further distinguishable from the graduate assistants in *Columbia*.¹⁷ The Duke Ph.D. Graduate Students are more like the fellows in *MIT* than the graduate assistants in *Columbia* in that their twelve-month stipend is tied to making academic progress—a singular focus on education—and not to any particular task.

Unlike as was found in *Columbia*, the record here shows that there is no “salient economic character” to the relationship between Teaching and Research Assistants and Duke; the relationship is not driven by the educational requirements of the undergraduate student body; Teaching and Research Assistants are not subject to the University’s direction and control; and, there is no exchange of services for compensation. Therefore, the petition must be dismissed as the students whom SEIU seeks to represent are not employees as defined in the Act.

A. Like the Fellows at MIT, Ph.D. Students at Duke Receive Their Full Stipend On An Annualized Basis Not Tied To Teaching Or Research Responsibilities

The Board in *Columbia* found it significant that graduate assistants were paid on a semester basis which is “not some insignificant or arbitrary period of time spent performing a task, but rather it constitutes a recurring, fundamental unit of the instructional and research operations of the university.” 364 NLRB at 1100. The non-employee fellows at issue in *MIT*

¹⁷ Although Duke has established facts rendering it sufficiently distinguishable from *Columbia*, the University disagrees with the Board’s holding in *Columbia* for the reasons stated in Section II *infra* (see pp. 44-48). The Board’s holding in *Columbia* represents an unwarranted departure from decades of firmly established Board law and has not yet withstood the test of judicial review.

were financed in “several ways” and all of it went toward educational endeavors even when they perform research or “occasionally” teach. *MIT DDE* at 2, 5.

A key material change during the last seven years is that Duke Ph.D. Graduate Students are funded and operate in a manner that is very similar—if not identical—to the fellows in *MIT*. The graduate students are fully funded for their entire course of study. They receive full tuition and health benefits at no cost, benefits which are not given to actual University employees. In addition, the students receive a yearly stipend from a variety of sources, including money from the department, school and university level, as well as from grants. The yearly stipend amount of \$33,660 represents Duke’s effort to provide students with the ability to focus on their academic studies, while honing their professional skills of pedagogy and research.

There is no exchange for services. The stipend is paid in twelve equal monthly installments regardless of whether they act as TAs. The University identifies in its appointment and reappointment letters the breakdown of the funds including that allocated for Teaching Assistantships. Despite this technical accounting, the amount the student receives never changes. The amount is not reduced if a student is unable to assume teaching duties during a given semester. Interim Provost Jennifer Francis, Dean of the Graduate School and Vice Provost of Graduate Education Suzanne Barbour, and the Chief Financial Officer and Associate Dean of the Graduate School all would testify “Graduate School policy is that if a student is expected to perform a teaching assistantship position in a given semester, the student must receive their full funding package each semester even if extenuating circumstances are present (e.g., such as doing research out of the country that semester and not being able to be a teaching assistant).” (Statement of Facts, § IV(C) *supra* at 30-32) While the funding source would “as a technical matter...need to change if a student is not teaching, the fellowship amount is increased in the

same amount from another funding source so that the student’s funding package is made whole.”
(*Id.*)

It is clear that the year-round funding of Duke’s Ph.D. Graduate Students means educational endeavors are not “controlled” by the University. Nor does it represent an exchange for particular services in the same sense as the graduate assistants in *Columbia*. Rather, the sole requirement for receipt of funding is that the student maintain good academic standing in the Duke Ph.D. program, the same as the fellows in *MIT*.

B. Teaching Assistants at Duke Are Not Employees Under the Columbia Test

1. Unlike in *Columbia*, Teaching Opportunities at Duke Are Part of the Academic Curriculum and Accompanied by Appropriate Academic Training Opportunities

Although the *Columbia* Board reversed *Brown* and thus found it “unnecessary to delve into the question of whether the relationship between student assistants and their universities is primarily economic or educational”—the standard properly applied in *Brown*—the Board nevertheless engaged in a lengthy analysis of that issue. *See* 364 NLRB at 1094-95.

In *Columbia*, the Board found that teaching assistants were “thrust wholesale into many of the core duties of teaching,” suggesting that the purpose of students serving as teaching assistants “extend[ed] beyond the mere desire to help inculcate teaching skills,” and underscored the “salient economic character” of the student assistants’ relationship to the university. *Id.* at 1095. Relying on the “salient economic character” of the student-university relationship that was found in *Columbia*, the Board held that the students in the petitioned-for unit were employees.

At Duke, however, there is no “salient economic character” to the relationship between Teaching Assistants and the University. Far from being “thrust wholesale” into instructional duties, Duke TAs typically receive training provided by both their department and the Graduate

School in advance of and while serving as Teaching Assistants, reinforcing the academic nature of their pedagogy.

Indeed, as explained in the Statement of Facts, *on top of* the training encouraged (and often incentivized) by the Graduate School for *all* Ph.D. Graduate Students—such as that provided by the CCT Program, the PFF Program, Bass Instructional Fellowships, and College Teaching Workshops—the individual departments are *also* instructed to “ensure that each TA has the training necessary to be successful.”¹⁸ (Joint Ex. 4) For example:

- In the Romance Studies Department, students enter a pedagogy training program beginning in the second semester of the second year—which includes a course on teaching methods, instructorship in the language program, and a Teaching Assistantship—*before* students have the opportunity to teach a course of their own design in their fifth year. (Statement of Facts, § II(B)(3) *supra* at 11)
- In the English Department—*before* serving as a Teaching Assistant or Instructor-of-Record for a course during their third through fifth years—students must complete a “Teaching Apprentice” program during their first two years, which includes observing two undergraduate courses and meeting weekly with the professors to discuss pedagogical issues. (Statement of Facts, § II(B)(3) *supra* at 11)
- In the Engineering School, students are required *both* (i) to attend a teaching orientation *before* serving as a Teaching Assistant; and then (ii) to *also* take a seminar on teaching concurrently with each of their Teaching Assistant appointments, which affords additional pedagogical instruction and a venue in which to discuss and improve upon their teaching experiences. (Statement of Facts, § II(B)(3) *supra* at 12)

Furthermore, the individual Ph.D. programs are also instructed to, among other things, “provide graduate TAs with faculty teaching mentor(s) who can provide ongoing guidance during their appointment,” to “enhance the [TAs’] training and teaching experience.” (Joint Ex. 4) Duke’s singular emphasis on training and development of pedagogical skills, coupled with the

¹⁸ For example, the Graduate School denotes participation in the PFF and CCT programs on student transcripts, and students who complete the CCT program receive a certificate upon graduation—not only resulting in helpful skill building but increased post-Ph.D. employability. (Statement of Facts, § II(B)(2) *supra* at 9)

various departmental requirements for sequenced teaching opportunities, contrasts sharply with the “salient economic character” of the relationship between instructional fellows and the university that was the basis for the Board’s decision in *Columbia*. There is no evidence here to support any finding that Duke’s Teaching Assistants have an economic relationship to the University. Indeed, the proof shows that the relationship is purely educational.

2. Teaching Opportunities at Duke Are Not in Service of Undergraduate Course Requirements or Enrollment, as Duke Students Invariably Teach Courses that Are Related to Their Course of Study

In further support of the “salient economic character” of the relationship between teaching assistants and the university found by the Board in *Columbia*, the Board noted that some students taught components of “the core curriculum, which is Columbia’s signature course requirement for all undergraduate students regardless of major.” *Columbia*, 364 NLRB at 1093. In contrast, at Duke, virtually all teaching assignments that Ph.D. Graduate Students will handle in the course of their studies will be within their department or areas of intellectual interest.

As the discussion concerning the new Ph.D. Graduate Student declarations amply demonstrates, teaching assignments are generally related to their academic program. (Statement of Facts, § IV(B)(1) *supra* at 25-29) And, as part of students’ academic program, teaching outside of their narrow dissertation topic is excellent training for a career in academia, industry, government, and NGOs. (*Id.* at 28)

In contrast to *Columbia*, where the Board relied heavily on the fact that teaching opportunities for graduate students were geared toward fulfillment of the university’s instructional needs for the undergraduate student body, teaching opportunities for Ph.D. Graduate Students at Duke are designed to train doctoral students how to teach, in furtherance of their educational and future career objectives.

3. Unlike in *Columbia*, Ph.D. Graduate Students at Duke Receive Their Full Stipends Even When They Cannot Serve as a Teaching Assistant and, Therefore, Are Not Exchanging Services for Compensation

The Board in *Columbia* held that the instructional fellows in that case received compensation in exchange for “instructional services.” In reaching that conclusion the Board relied on the fact that “[r]eceipt of a full financial award is conditioned upon their performance of teaching duties,” and that “[w]hen they do not perform their assigned instructional duties, the record indicates they will not be paid.” 364 NLRB at 1094. The Board found that this “explicit conditioning of awards on performance of teaching duties, demonstrates that the university offers student assistants stipends as consideration for fulfilling their duties to perform instructional services on the university’s behalf.” *Id.* This is not so at Duke.

As fully explained in Section IV(C) above, the amount of the stipend **does not change** even if a student cannot conduct a Teaching Assistantship. The funding comes from a variety of sources, some of which might be allocated for a Teaching Assistantship. However, such direct allocation is a “technical” matter, and the University will replace such direct allocation with other funding when necessary to ensure the full amount of the stipend is received. Nothing in the Stipulated Record detailing graduate student testimony contradict this fact. Indeed, the graduate student declarations support the University’s assertion that all teaching is pedagogical in nature. Thus, Hunter Augeri, a graduate student in the English department, notes that he was moving out of state at a time when he was expected to teach. Mr. Augeri’s department “is currently trying to help place him in an assistantship” he can perform remotely, but if those efforts failed “he would not receive the TA portion of his stipend.” (Joint Stip. at ¶ 5(dd)). This does not—and could not—state that Mr. Augeri’s overall stipend would be reduced if he was unable to teach. Indeed, the fact the University is working with him to complete an educational requirement—teaching—shows the overarching educational goal of success in attaining the Ph.D. degree.

Because Duke students receive their full stipends even when they cannot fulfill their instructional duties as expected, it cannot be said that they are receiving compensation in exchange for services as required by the common law test articulated in *Columbia*.

However, it is not dispositive that the Graduate School and departments occasionally use terms like “work” or “service” to describe tasks performed by Teaching Assistants or Research Assistants. The Union points to the fact W-2s are issued for certain portions of a Ph.D. Graduate Student’s stipends. (Joint Stip. Attachment D) But the Board does not give controlling weight to taxability determinations of the Internal Revenue Service. *Fraley & Schilling, Inc.*, 211 NLRB 422, n.4 (1974) (Board does “not consider the method of payment by Responding [whether by 1099 or W-2] to its owner-operators, standing alone, to be determinative of the issue of the latters’ employee status for the purposes of the Act.”) The W-2’s issued have no legal significance here, nor does the fact that the IRS taxes student stipends. The IRS collects taxes from many individuals who are not “employees” under the Act, e.g., independent contractors.¹⁹ The use of such terminology has no bearing on the relationship between the students and the University. Likewise, the common law test applied by the Board in *Columbia* – whether an individual receives compensation in exchange for services – does not require inquiry into the terminology used by the purported employer. The fact that the University must comply with state, local, and federal tax regulatory regimes and processes student stipend support accordingly, does not turn students into employees. (Statement of Facts, § III(A) *supra* at 16 n.11)

¹⁹ See <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined>.

4. Teaching Assistants Are Generally Not Removed From Their Positions, Even if They Are Struggling or Inadequate; Therefore, They Are Not Under the University's "Control"

A materially different relationship exists between Duke faculty and Teaching Assistants than was found to exist in *Columbia*. In *Columbia*, the Board found that the university maintained "control" over the work of teaching assistants based on evidence "that teaching assistants who do not adequately perform their duties to the university's satisfaction are subject to corrective counseling or removal." 364 NLRB at 1094. As discussed, this is contrary to what the Regional Director found in the 2017 DDE. (Statement of Facts, § IV(B)(2) *supra* at 29-30)

At Duke, Teaching Assistants who are not performing well are generally not removed from their positions. The department will work with a student to improve skills. (Joint Stip. at ¶ 5(u)) It is obvious that students who do not perform well at a task are neither disciplined nor removed, meaning that the control aspect is missing. The purpose of counseling to improve teaching skills is solely for the benefit of the graduate student.

The undisputed fact is that there is no evidence that a Duke Teaching Assistant has been removed, even when they discharged their responsibilities ineffectively, demonstrating that Duke does not exercise "control" over Teaching Assistants in the manner contemplated by the *Columbia* Board's common law test.

For all these reasons, the Regional Director should not—and cannot—find that Duke's Teaching Assistants are employees under the Act.

C. Research Assistants at Duke Are Not Employees Under the *Columbia* Test or *MIT*

1. Research Assistants Are Not Subject to the University's Control Because They Choose Their Own Areas of Research

The Board in *Columbia* found that the university exercised the requisite control over research assistants to render them statutory employees because, although funded under the terms

of a research grant, the research assistants were not “permitted to simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress[.]” 364 NLRB at 1096-97. At Duke, however, one of the central tenets of Graduate Education—as explained in the Core Expectations—is ensuring that each graduate student engages in “development of an *individual* research agenda.” (Statement of Facts, § II(C) *supra* at 12 (emphasis added)) And, to that end, graduate faculty are charged with, among other things, “respect[ing] students’ research interests/goals and [] assist[ing] students in pursuing/achieving them.” (*Id.*) Like the fellows at MIT, the funding effectively attaches to the student rather than a particular project and may not be reduced. (*MIT DDE* at 7)

Thus, from the moment a Ph.D. Graduate Student steps onto campus, their activities as a Research Assistant and their academic progress towards their degree are completely aligned. For example, in engineering and biomedical Ph.D. programs, Ph.D. Graduate Students exercise discretion in choosing a faculty advisor or laboratory that aligns with their research interests at the outset of their degree programs. Engineering students apply directly to work with a particular faculty member and typically spend the entirety of their academic journey training with this faculty member. (Statement of Facts, § II(C)(1) *supra* at 13) Biomedical Ph.D. students elect to join a lab, after a year of lab rotations and guidance from a mentoring committee, that most closely relates to the student’s field of study or research interests. (Statement of Facts, § II(C)(1) *supra* at 14) And because Ph.D. Research Assistants typically pursue a dissertation topic that closely relates to the research being conducted in the lab or research group they are paired with, the time they spend in the laboratory is dedicated to furthering both the research of the lab as well as the student’s own dissertation research. (Statement of Facts, § II(C)(1) *supra* at 14)

The declarations submitted by the Union from Research Assistants demonstrate that the research they conduct in labs is inextricably intertwined with their own research and scientific pursuits. (Statement of Facts, § IV(B)(1) *supra* at 28-29) The fact that there is not a complete overlap in every experiment or research project does not transform their academic experience into “work.” Indeed, the lack of complete overlap is critical for the originality of a student’s dissertation. The Ph.D. Graduate Students serving as Research Assistants are much more similar to the fellows at MIT than the graduate assistants at Columbia. (*See MIT DDE* at 11) (“The fact that fellows must meet no employment responsibilities or service requirements to receive or maintain their fellowship awards supports a finding of non-employee status.”)

Even the *Columbia* Board would have to agree that students performing dissertation research cannot, by reason of that fact alone, be considered statutory employees. Because Research Assistants generally choose and control the research they perform, they are not employees under the *Columbia* common law test.

2. Duke Research Assistants Are Not Exchanging Services for Compensation Because They Are Guaranteed Funding Even if They Cease to Be Funded by Their Research Grant

As the Regional Director found in 2017, Duke Ph.D. Graduate Students are guaranteed funding through the first five years of study, with additional access to tuition support for their sixth year. (Joint Stip. Attachment A at 4; Joint Stip. Attachment C at Attachment 18) Even if a Research Assistant leaves a research lab or a student’s PI loses their grant support, the student’s full funding continues through the Graduate School’s backstop policy. (Statement of Facts, § III(A)(1) *supra* at 19) The Union does not—and cannot—contest this essential fact.

The record firmly establishes that at Duke, receipt of a full financial award is *not* conditioned upon a student’s performance of specific research duties. Unlike in *Columbia*, full funding is available even for students whose research is not specifically dictated by a grant that

was the basis for their admission. Again, this situation at Duke is more akin to the non-employee fellows at MIT. (*See MIT DDE*)

Accordingly, RAs at Duke do not meet the common law test of employee status.

II. *Columbia* Created an Unworkable Test of Employee Status and Must Be Revisited

The University maintains that the 2,500 Ph.D. students sought in the petition are distinguishable from the students found to be employees in *Columbia*, but also that the Board's framework in that case was clearly erroneous and must be reconsidered. Among other fatal flaws, the Board minimized the fundamentally educational nature of the student-university relationship while giving all weight to teaching and research responsibilities. This telescoping of certain aspects of the educational experience to the exclusion of all other parts is precisely why—for the first 81 years of the Act's existence—the Board excluded graduate teaching and research assistants from coverage as employees considering them primarily students. The *Columbia* Board did not identify a single changed circumstance warranting a reversal of eight decades of precedent. *Columbia* does not further Section 1 of the Act's singular "policy . . . to eliminate the causes of certain substantial obstructions to the free flow of commerce" or any other national policy. 29 U.S.C. §151. The decision harms the educational mission of colleges and universities throughout the United States and should be reversed.

Duke recognizes the Regional Director may be bound to follow *Columbia* here until that decision is overruled by the Board. The University reserves the right to argue that *Columbia* was wrongly decided. In furtherance of that objective, Duke emphasizes the following for the record.

For the vast majority of the Act's existence, the Board recognized that imposing a collective bargaining relationship between faculty and students at an educational institution would be both unwarranted and inappropriate. Asserting students at an educational institution were statutory employees did not surface as a serious issue for the first 37 years of the Act's

existence when, in *Adelphi University*, 195 NLRB 639, 640 (1972), the Board held that graduate students serving as teaching and research assistants were “primarily students” because they were “working toward their own advanced academic degrees.” *Id.* As such, the graduate students were excluded from a bargaining unit of university faculty. The Board observed that unlike the largely autonomous work performed by regular faculty, graduate student assistants were “guided, instructed, assisted, and corrected in the performance of their assistantship duties by regular faculty members” who supervised their work. *Id.*

Two years later, in *Leland Stanford Junior University*, 214 NLRB 621 (1974), the Board relied on *Adelphi* to reach the same conclusion regarding research assistants, finding that any “compensation” the students received from the university came in the form of financial aid, either stipends or grants, “to permit them to pursue their advanced degrees,” offered without regard to the “skill or function of the particular individual” or the “‘services’ rendered or their intrinsic value.” *Id.* at 621-22.

The common thread of the early student cases demonstrates the Board’s generally-accepted principle that the Act should cover an individual only where a fundamentally economic relationship exists between the Parties such that it is an employer-employee relationship. *See WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) (volunteer who gained some benefits from the employer not a statutory employee because a “central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees. . . The vision of a *fundamentally* economic relationship between employers and employees is inescapable.”) (emphasis supplied).

The Board then—without cause—departed from the sensible framework in *New York University*, 332 NLRB 1205 (2000) (“*NYU*”), holding for the first time in the history of the Act,

that graduate students serving as teaching and research assistants were statutory employees. In reaching this unjustifiable conclusion, which was definitively rejected just four years later in *Brown University*, 342 NLRB 483 (2004), the *NYU* Board ignored the primarily educational nature of the relationship between students and their university. Relying almost exclusively on selected elements of the relationship that could be viewed as having some trappings of employment, the Board simplistically—and without addressing prior decisions—held the *absence* of express exclusion of students was somehow significant: “graduate assistants are not within any category of workers that is excluded from the definition of ‘employee’ in Section 2(3).” 332 NLRB at 1206. The *NYU* Board also mischaracterized both the faculty direction of teaching and research assistants as “right of control” and—with no findings or analysis—the financial aid provided to graduate students as “compensation” for services. *Id.*

The utter weakness of the *NYU* Board’s conclusion lasted only briefly before it was overruled in *Brown*. The NLRB returned to the decades-old precedent, concluding once again that graduate student assistants are not statutory employees. The *Brown* Board identified many factors supporting its conclusion that the relationship between graduate assistant and university is primarily educational, including:

- Graduate student assistants are admitted into, not hired by, the university;
- Graduate assistants must be enrolled in the university to receive an instructional or research appointment, and their status is contingent on continued enrollment as students;
- Graduate students focus principally on obtaining a degree, *i.e.*, being a student, and service time as a graduate assistant is limited;
- Teaching is an important component of most Ph.D. programs offered by the university, and often is required as a condition to receive the Ph.D. degree;

- Graduate student assistants perform their service under the direction and control of department faculty members, often the same faculty who serve as the student's dissertation advisor;
- The university provides financial support only to students, and only for the period in which the students are enrolled;
- Fellows without appointments receive the same financial aid as do students with instructional and/or research appointments; the aid is not "consideration for work"; and
- The vast majority of doctoral students receive financial aid.

Brown, 342 NLRB at 488-489. Weighing all of these factors, the *Brown* Board properly concluded that treating graduate assistants as employees would be inconsistent with the purposes of the Act and the definition of employee. Addressing the policy of the Act, the Board added "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process." *Id.* at 488-90, 493. In other words, a primarily educational purpose was the inverse of removing obstructions to the free flow of commerce.

Unfortunately, as is all too prevalent in the modern era, precedent was again overturned in 2016 when the Board returned to the flawed—and outcome determinative—reasoning of *NYU* in *Columbia University*, concluding once again that "student assistants who have a common-law employment relationship with their university are statutory employees under the Act."

Columbia, 364 NLRB 1080, 1081 (2016). Without justification, the Board overruled nearly 40 years of precedent (and after an additional 40 years of silence on the issue).²⁰

²⁰ The Board has had an unfortunate history of flip-flopping on important issues as its political composition changes, for which it has been criticized by many circuit courts. *See, e.g., Beverly Enters., Va., Inc. v. NLRB*, 165 F.3d 290, 296 (1999) ("What promoted [the Board's] shift from its earlier position is unclear...But it has prompted widespread speculation that the Board's decisions on this subject are based not on the three-pronged [supervisor] test of the Act but on a 'policy bias.'"), *abrogation recognized by Palmetto Prince George Operating, LLC v. NLRB*, 841 F.3d 211, 217 (4th Cir. 2016); *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) ("the Board has not been consistent in its choice of standard. . . In such cases, the

Policy issues support a call for reconsideration—and reversal—of *Columbia*. Academic freedom is infringed upon by the imposition of rights and obligations suited for the private sector employee onto students and faculty. By treating graduate students as Section 2(3) employees, the Board necessarily becomes involved in issues that undermine the University’s freedom to establish and implement academic policy.

III. In the Event That an Election is Directed, Certain Election Issues Must be Resolved

A. Payroll Period Ending Dates

Duke’s Statement of Position in this case set forth accurate payroll ending periods as of the date of filing. As of April 7, 2023, the new dates are as follows: For most Ph.D. Graduate Students on a monthly stipend schedule, March 24, 2023. For certain Ph.D. Graduate Students on a monthly stipend schedule, March 31, 2023. For Ph.D. Graduate Students on a biweekly stipend schedule, April 7, 2023.

B. Election Type and Mechanics

The Parties agree to a limited mixed manual and mail ballot election; the Parties also agree that, for an election held prior to April 19, 2023, mail ballots would be sent only to

Board is not entitled to the normal deference we owe it.”); *Construction, Bldg. Material, Ice & Coal Drivers, Helpers & Inside Emps. Union, Local No. 221 v. NLRB*, 899 F.2d 1238, 1241 (D.C. Cir. 1990) (“We have tempered our deference in this case, mindful that the Board is endeavoring to apply agency law principles and that its position has changed or evolved over time.”); *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 210 (5th Cir. 2001) (“Given such vacillation, the Board’s classification of this group of workers. . .is entitled to little judicial deference.”); *Local 777, Democratic Union Org. Comm., Seafarers Int’l Union of N. Am., AFL-CIO v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (finding “any great amount of deference” “inappropriate” “because of the Board’s history of vacillation.”); *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610, 612-613 (7th Cir. 1983) (noting Board’s “fickleness” and criticizing its “inability to decide what standard to use.”); *Epilepsy Found. of Ne. Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (noting that the Board’s conclusion was “debatable” because the Board “‘changed its mind’ several times in addressing this issue.”). The Board should not allow another instance of politically-motivated reversal to stand, and should return to its well-reasoned and longstanding precedent represented by *Brown*.

students enrolled at the University's Beaufort Campus or who are "registered in absentia," as defined by the Parties as students performing field work outside of the Raleigh-Durham metro area. (Tr. 48-49). For elections held after April 19, 2023, the Parties' positions diverge. Duke asserts that the limited (to Beaufort Ph.D. students and those Ph.D. students known to be away from campus) mixed manual and mail ballot described above is the only feasible way to hold such an election.

C. Voting Locations

The Parties agree that the on-campus locations for the manual election should be the Levine Science Research Center, the Fitzpatrick Center, Gross Hall, the Bryan Center, and the Lilly Library. (Tr. 60) Duke must be consulted if there are changes to the number of locations. Manual ballot voting should be conducted with voters assigned to locations closest to their department, with voter eligibility lists reflecting such assignment. (Tr. 61-62). This limited mixed manual and mail ballot format has been used by Regional Directors in other university cases. (*See generally University of Chicago*, Case No. 13-RC-307974 (2022); *Yale University*, Case No. 01-RC-305762 (2022))

*D. Voter Eligibility for an Election Held After August 22, 2023*²¹

The Parties disagree as to the voter eligibility criteria for any election held after the start of the Fall 2023 semester (on or after August 22, 2023). (Tr. 41) If an election is held after August 22, 2023, the look-back should be limited to two semesters consisting of Spring 2023 and Fall 2022. (*Id.*) The Union asserts that an election held in Fall 2023 must include three semesters of eligibility including Spring 2023, Fall 2022 and Spring 2022. (*Id.*) The three-semester look-

²¹ The Parties agree that a two-semester look-back should be used for an election held prior to Fall 2023, which would include students in the unit as of Spring 2023, Fall 2022 and Spring 2022. (Tr. 40-41).

back used in the prior 2017 Duke representation matter was based on a nine-month stipend, which no longer exists. Duke asserts that it would be inappropriate, considering the 12-month stipend, to impose a three-semester look-back. Indeed, in the 2017 DDE, the Regional Director found there was no look-back period for students receiving a twelve-month stipend. (Joint Stip. Attachment A at 35) There is no reason to increase a voter eligibility period.

E. Election Schedule

As noted at the hearing, the end of the Spring semester brings with it a confluence of important events which make setting any election between April 20 and May 14, 2023, disruptive and difficult. The graduate student semester ends on April 19, followed by final exams from May 1 through May 6, 2023. (Tr. 43, 53) Commencement is scheduled on May 14, 2023. (Tr. 43-44) This is a very disruptive time, and setting an election in this period will impact exams, Commencement and other pre-scheduled University events. (Tr. 43-44, 48, 53)

CONCLUSION

For all the reasons stated above, the petition must be dismissed.

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New York, New York

Respectfully Submitted

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

DUKE UNIVERSITY,

and

**SOUTHERN REGION WORKERS UNITED-
SEIU.**

Case No. 10-RC-313298

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CERTIFICATION OF SERVICE OF: Duke University's Post-Hearing Brief


I hereby certify that, on the 7th day of April 2023, I caused the above-entitled document(s) to be served by the methods indicated below, upon the following persons at the following addresses:

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